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No. 88-...

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1988

DONALD KELSEY, DAVID KELSEY and KATHY KELSEY,

Petitioners,

vs.

MUSKIN, INCORPORATED, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does section 23(a) of the Consumer Product Safety Act, 15 U.S.C. sec. 2072(a), provide a private right of action for violation of the reporting rules promulgated by the Consumer Product Safety Commission (16 C.F.R. Part 1115)?

2. Is the "by reason of" causation element of section 23(a) of the Consumer Product Safety Act, 15 U.S.C. sec. 2072(a), governed by federal law?

3. Does an agency relationship exist, pursuant to the Consumer Product Safety Act, between the Consumer Product Safety Commission and members of the consuming public so as to permit a federal action by consumers injured by fraud and deceit perpetrated upon the Commission?

LIST OF PARTIES

The parties to the proceedings below were the petitioners DONALD KELSEY, DAVID KELSEY, and KATHY KELSEY, and the respondents MUSKIN INC., a corporation, MUSKIN CORP., a corporation, U. S. LEISURE, INC., a corporation, AMCORD INC., a corporation, AMERICAN CEMENT CO., a corporation, CERTAIN OFFICERS AND DIRECTORS OF MUSKIN, individually, CBS URBAN RENEWAL CORP., a corporation, IDEAL TOY CORP., a corporation, STERLING UNION CORP., a corporation, U. S. FIBER & PLASTICS CO., a corporation, CERTAIN OFFICERS AND DIRECTORS OF THE CBS URBAN RENEWAL CORP., individually, NATIONAL SPA AND POOL INSTITUTE, a corporation, WILLIAM LEROY JOHNSON d/b/a JOHNSON POOL CO., individually, IMPERIAL POOLS, a corporation, COLECO INDUSTRIES, INC., a corporation, DOUGHBOY RECREATIONAL, a

corporation, ESTHER WILLIAMS/JOHNNY WEISMULLER POOLS, a corporation, BILNOR POOLS, a corporation, SAM HART, individually, and DOES 1-20 INCLUSIVE.

All but respondent "Sam Hart" [1/] are parties to the instant petition.

[1/] "Sam Hart" is in actuality a misnomer., Donald Hart was incorrectly sued in the name of "Sam Hart" below.

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PETITION FOR WRIT OF CERTIORARI

The petitioners Donald Kelsey, David Kelsey, and Kathy Kelsey respectfully

pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The United States District Court for the Northern District of New York (McAvoy, D.J.) recognized petitioners' private right of action under section 23(a) of the Consumer Product Safety Act for violations of the reporting rules promulgated by the Consumer Product Safety Commission (16 C.F.R. Part 1115), but dismissed petitioner's federal claim based upon application of state product liability law. The District Court's memorandum decision and order has not been reported. It is reprinted in Appendix A.

The order of the United States District Court for the Northern District

of New York denying rehearing has not been reported. It is reprinted in Appendix B.

The opinion of the United States Court of Appeals for the Second Circuit (Kearse, C.J.) is reported at 848 F.2d 39 and is reprinted in Appendix C.

The order of the United States Court of Appeals for the Second Circuit denying petitioners' petition for a rehearing has not been reported. It is reprinted in Appendix D.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was decided May 31, 1988. The order of the United States Court of Appeals for the Second Circuit denying petitioners' petition for a rehearing was filed on August 18, 1988.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. sec. 1254 (1).

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. sec. 2051
Congressional Findings and Declaration of Purpose.

15 U.S.C. sec. 2064
Substantial Product Hazards.

15 U.S.C. sec. 2072(a)(c)
Suits for damages.

16 C.F.R. Part 1115
Substantial Product Hazard Reports

The text of the foregoing statutes and regulation is reprinted in Appendix E.

STATEMENT OF THE CASE

Nearly 2,000 people a year are estimated to incur traumatic spinal cord injury as a result of diving head-first into water which is too shallow. R.I. 98-108,237-238.[2/] See, Epidemiology, Pathomechanics, and Prevention of Athletic Injuries to the Cervical Spine, 17 Medicine and Science in Sports and Exercise, 295 (1985). Notwithstanding this staggering statistic, since the early 1950's and 1960's, the swimming pool industry has promoted their 3 to 4 foot deep above-ground swimming pools as safe for head-first diving.

2/ Citations in the form "R.I. _____" are to the numbered pages of the record items filed with the court below.

On a summer afternoon in 1984, petitioner, twenty-one year old Donald Kelsey, was rendered a permanent quadriplegic when he dived head first into an above-ground swimming pool from a nearby deck railing attached to the house of his friend, Richie Hart. Donald had previously watched Richie perform this exact dive into the pool from the same railing on numerous occasions without injury. R.I. 234-236.

Donald, however, was not as fortunate as Richie. Donald miscalculated his dive trajectory and hit his head on the bottom of the Hart swimming pool. R.I. 98-108, 237-238. The contact of Donald's head with the bottom of the pool resulted in an explosion fracture to his spine at the C-5, C-6 level, rendering him a permanent quadriplegic. Donald has lost forever

the use of his arms, legs and torso below the nipple level.

It is uncontested that the swimming pool in which Donald was injured contained no warnings against diving. Donald Kelsey testified in his affidavit before the District Court that, had the pool contained warnings informing him of the information concerning the risk of crippling injuries known by the industry, he would not have dived. R.I. 234-236.

The swimming pool was purchased by Richie Hart's parents sometime in 1969. During the same time period, 1967-1977, numerous articles appeared in swimming pool industry trade journals pertaining to the hidden hazards associated with head-first dives into shallow water pools. R.I. 98-108. Discussions were even held within the industry concerning the total number of persons then being rendered quadriplegic as a result of head-first entries into above ground

swimming pools. The need for adequate warning signs prohibiting this activity was also discussed by the industry. R.I. 98-108, 237-238.

Notwithstanding the industry's active discussions and knowledge of the hazards of head first diving into their above ground pools, no warning of any kind was provided to the Harts as owners of the pool, or to Donald Kelsey. To this day, despite crippling injuries occurring at the rate of nearly 2,000 annually, no warnings have ever been provided by the industry to the Consumer Product Safety Commission.

Petitioners initiated this federal action for injuries sustained by them as a result of the industry's

failure,[3/] as required under the Consumer Product Safety Act, 15 U.S.C. 2051 et. seq. ("CPSA"), and related regulations of the Consumer Product Safety Commission ("CPSC"), to report substantial product hazards associated with their swimming pool products. Pendent state law theories of strict product liability and

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3/ Petitioners, unable at the time of filing their suit to identify the manufacturer(s) of the swimming pool in which Donald was injured, named in addition to those believed to be the manufacturer(s), the industry's manufacturers and trade association which through pre-suit investigation were also shown to have jointly controlled information of the hazards presented by head-first diving and which consciously withheld this information from the CPSC. See, Hall v. E.I. DuPont De Nemours & Co., 345 F.Supp. 353 (E.D.N.Y.) Hereinafter, use of the term "industry" shall refer collectively to all the respondent swimming pool manufacturers and their trade association.

negligence were also raised. [4/]

Shortly after the case was at issue to all parties, certain of the manufacturers moved for summary judgment on the issue of whether Donald Kelsey's contributory negligence under New York law was the sole proximate cause of his injuries. The court invited all other interested parties to submit motions on that issue. R.I. 109-111.

All of the industry respondents joined in moving for summary judgment on the issue of Donald Kelsey's conduct. One industry defendant also attacked the

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[4/] There being no federal question sufficient to call upon this Court's discretionary review, petitioners' pendent state law claims against the industry and the swimming pool owner are not the subject of this petition. See, Sup. Ct. R. 17.

court's subject matter jurisdiction over petitioners' claims by alleging there exists no private right of action under the Consumer Product Safety Act ("CPSA") for violations of the disclosure rules promulgated by the Consumer Product Safety Commission ("CPSC"). No party, however, moved for summary judgment on the substantive merits of petitioners' CPSA claims. R.I. 60-61, 66-67, 112-113, 138-139, 142-143, 191-192.

On June 25, 1987, the District Court granted summary judgment to the defendant manufacturers and trade association under state law, finding that "Donald Kelsey's conduct was, as a matter of law, a superseding cause of the injuries complained of. " Memorandum Decision and Order at 17 (reprinted in Appendix A).

In so doing, the District Court sustained its subject matter

jurisdiction, finding that a plain reading of the CPSA supported petitioners' private right of action. The District Court, however, dismissed both petitioners' federal CPSA claims and pendent state law claims based on its finding under state law, despite no motion before it by the industry directed to the substantive merits of petitioners' CPSA claims.

Petitioners timely moved for reconsideration of the District Court's decision. On October 20, 1987, reconsideration was denied.

Petitioners thereafter timely filed their Notice of Appeal with the United States Court of Appeals for the Second Circuit. Respondents cross-appealed on the issue of whether a private right of action exists under the CPSA for

violation of the CPSC's disclosure rules.[5/]

The Second Circuit affirmed the District Court in an opinion reported at 848 F.2d 39 and decided on May 31, 1988. The Court of Appeals, noting the conflicting decisions throughout the federal courts, did not decide the question of whether or not the CPSA provides a private right of action for violation of the CPSC reporting rules. 848 F.2d at 42. Yet, the Court of Appeals, also relying upon New York State product liability law in its recent decision of Caraballo v. United States, 830 F.2d 19 (2d Cir. 1987), held that

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5/ Although raised by only one respondent in the District Court, the industry jointly filed a brief in the United States Court of Appeals for the Second Circuit asserting that no private right of action exists under the CPSA for violation of the CPSC's reporting rules.

even if it recognized petitioners' private right of action, Donald Kelsey could not establish that his injury occurred "by reason of" any failure to disclose under the CPSA. Id.

Petitioners filed with the Second Circuit Court of Appeals a petition for rehearing which was denied on August 18, 1988.

REASONS FOR GRANTING THE WRIT

I

DESPITE THE PLAIN LANGUAGE OF 2072(A) OF THE CPSA PROVIDING FOR A PRIVATE RIGHT OF ACTION FOR VIOLATIONS OF "ANY OTHER RULE OR ORDER" ISSUED BY THE CPSC, THE FEDERAL COURTS ARE IN CONFLICT AS TO WHETHER A PRIVATE RIGHT OF ACTION EXISTS FOR VIOLATIONS OF THE CPSC'S REPORTING RULES (16 C.F.R. 1115) AND THIS IMPORTANT QUESTION OF CONSUMER PROTECTION SHOULD BE SETTLED BY THIS COURT.

Review of the decisions below and others within the federal courts, settling the private right of action

question here involved, is necessary for the fulfillment of the intentionally broad and uniquely federal remedial purpose of the CPSA and its goal of uniform public protection. The legislative history of the CPSA reveals the importance of: (1) private rights of action for violation of the CPSC's reporting rules and (2) the invocation of uniform federal law to govern those rights. These important rights require the attention of this Court.

Congress first established the National Commission on Product Safety ("NCPS") in November, 1967. Its purpose was to examine methods of protecting consumers against unreasonable risks of injury from household products and to propose remedies for existing legal inadequacies in state law. Act of Nov. 20, 1967, Pub. L. No. 90-146, 81 Stat. 466. The NCPS determined the then

current state, local, and common law in the area of consumer product safety to be piecemeal or "hodgepodge" and consistently inadequate to afford protection to the U.S. consumer. See, The Consumer Product Safety Act, Text, Analysis, Legislative History (BNA) pp. 19-34 (1973). See also, Wahba v. H & N Prescription Center, Inc., 539 F.Supp. 352,354 (E.D.N.Y. 1982).

Following more than two years of study, the NCPS submitted its final report to Congress in June, 1970. Foremost among the recommendations of the NCPS was the development of an independent federal regulatory agency on consumer product safety. In 1972, the Act established the Consumer Product Safety Commission ("CPSC"), an independent federal regulatory agency vested with

broad authority to protect against hazardous consumer products. Pub. L. No. 92-573, 86 Stat. 1207 (1972), 15 U.S.C.S. secs. 2052-2083.

The Consumer Product Safety Act ("CPSA") as enacted is designed as a means to prevent injury rather than just provide compensation after injury has occurred. The Consumer Product Safety Act and Private Causes of Action for Personal Injury; What Does a Consumer Gain? 30 Baylor L.Rev. 115 (1978). One of the Act's primary purposes, and one of the CPSC's principal means of fulfilling this mission, has been the promulgation of uniform national safety standards for consumer products. 15 U.S.C. sec. 2051(b)(3). The Act contains a comprehensive enforcement scheme which includes such measures as civil and criminal penalties, injunctive remedies

and seizure. Id. sec. 2069-2071, 2073.

In addition to the above, an equally integral means of enforcement is provided in the form of private rights of action. Section 2072 of the Act expressly provides in pertinent part:

> Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, **or any other rule or order issued by the Commission** may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent, shall recover damages sustained...

Petitioners' federal cause of action below was premised upon the "any other rule or order" clause of 2072(a). Petitioners alleged, inter alia, that the swimming pool industry knowingly and willfully violated the disclosure requirements of the CPSA (15 U.S.C. 2064(b)) and the CPSC's reporting rules (16 C.F.R. Part 1115), when, upon

obtaining information which reasonably supported the conclusion that their above ground swimming pool products contained a defect which could create a substantial product hazard, the industry failed to inform the CPSC as required. The failure of the industry to report the frequently occurring catastrophic diving injuries resulting from dives into above ground swimming pools and the resultant failure to provide any warning against such activity resulted in the crippling injuries to petitioner Donald Kelsey, and many others like him who have used above ground pools for diving unaware of the severe risk of quadriplegia, paraplegia or death. See, National Ornament & Electric Light Christmas Ass'n v. Consumer Product Safety Commission, 526 F.2d 1368 (2d Cir. 1975); Aqua Slide 'N' Dive Corp. v. Consumer Product Safety 569 F.2d

831, 841 (5th Cir. 1981), [CPSC's regulation requiring explicit warning on swimming pool slides that paralysis can occur in shallow water set aside by court because CPSC, inter alia, did not provide for retrofitting of warnings on slides manufactured prior to promulgation of standard or for public education campaign].

The existence of a private right of action under the CPSA for violation of the CPSC's disclosure rules such as that alleged by petitioners was, until relatively recently, well settled. A recent decision of the United States Court of Appeals for the Eighth Circuit, however, conflicts with a long line of federal court decisions recognizing the private right of action for violation of the CPSC's reporting rules. This conflict within the federal courts was

recognized by the District Court and Court of Appeals below.

This Court was first asked to address the issue of a private right of action under the CPSA for reporting rule violations following a decision of the Minnesota Supreme Court in Swenson v. Emerson Electric Co., 374 N.W.2d 690 (Minn. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1998, 90 L.Ed.2d 678 (1986). The issue there stated was "whether an alleged violation of the interpretive rule [16 C.F.R. Part 1115] promulgated [by the CPSC] to clarify the requirements of section 2064 of the CPSA states a cause of action under section 2072 of the CPSA." 374 N.W.2d at 699. The Supreme Court of Minnesota in Swenson recognized the private right of action by relying upon decisions within: the Second Circuit, Young v. Robertshaw Controls

Co., 560 F.Supp. 288 (N.D.N Y.1983)[6/] [argument that Congress did not intend to provide a private damage remedy for violation of a disclosure rule "ignores the express language of the statute"]; the Fourth Circuit, Butcher v. Robertshaw Controls Co., 550 F.Supp. 692 (D.Md.1981) [inclusion of phrase "or any other rule" belies any intention to prohibit private right of action for violation of disclosure rules]; the Sixth Circuit, Payne v. A.O. Smith Corp., 578 F.Supp. 733 (S.D.Ohio 1983) [actions alleging violations of reporting rules are "simply not foreclosed by the plain language of 15 U.S.C. Sec. 2072"]; the Seventh Circuit, Wilson v. Robertshaw Controls

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6/ Young v. Robertshaw Controls Co., 560 F.Supp. 288 (N.D.N.Y. 1983) was relied upon by the District Court below as comporting with the plain meaning of the statute in upholding petitioners' private right.

Co., 600 F.Supp. 671 (N.D.Ind.1985) [concurring with Butcher and Young, "the language of the statute at issue is plain and straightforward and the words, therefore, must be accorded their plain meaning"]; and the Eighth Circuit, Drake v. Lochinvar Water Heater, Inc., 618 F.Supp. 549 (D.Minn.1985)(rev'd sub nom. Drake v. Honeywell, Inc., 797 F.2d 603 (8th Cir.1986)). In so doing, the Minnesota Supreme Court, and the federal district court decisions relied upon in Swenson, rejected the reasoning of Kahn v. Sears Roebuck and Co., 607 F.Supp. 957 (N.D.Ga.1985) (Eleventh Circuit) and Morris v. Coleco Industries, Inc., 587 F.Supp. 8 (E.D.Va.1984) (Fourth Circuit) which had previously declined to recognize a private right of action for violation of the reporting rules.

On May 19, 1986, this Court denied

certiorari, leaving the decision of the Minnesota Supreme Court in Swenson standing. ___ U.S.___,106 S.Ct.1998, 90 L.Ed.2d 678 (1986).

After this Court's denial of certiorari in Swenson, a private right of action was again recognized for violation of the reporting rules within the Eighth Circuit in Hughes v. Segal Enterprises, Inc. 627 F.Supp. 1231 (W.D.Ark.1986) [7/], and again within the Fourth Circuit in Martin v. International Dryer Corp., 637 F.Supp. 101 (E.D.N.C.1986).

The courts in each of the numerous cases recognizing the private right of action have relied upon the plain language of section 2072 and a

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7/ Although decided well prior to Drake v. Honeywell, Inc., 797 F.2d 603 (8th Cir. 1986), no mention is made in Drake of Hughes v. Segal Enterprises, Inc., 627 F.Supp. 1231 (W.D. Ark. 1986).

realization that disclosure of product hazards under 2064(b) and 16 C.F.R. Part 1115 is of paramount importance to the functioning of the CPSC. As plainly pointed out by these courts, absent disclosure, it would be impossible for the CPSC to gain an awareness of substantial product hazards in order to even begin thinking about product bans or standards in the first place. Butcher v. Robertshaw Controls Co., 550 F.Supp. 692, 694-700. (D.Md. 1981).

In Drake v. Honeywell, Inc., 797 F.2d 603 (8th Cir. 1986), the United States Court of Appeals for the Eighth Circuit ruled contrary to this well settled law. The Eighth Circuit reversed a District Court finding of a private right of action (618 F.Supp. 549), and held that despite the admitted clear language of the Act, "Congress did not

intend a private right of action to arise from noncompliance with the Commission's reporting rules." Id. at 605-611. The Eighth Circuit's holding in Drake was urged upon, but rejected by, the District Court and United States Court of Appeals for the Second Circuit below.

In recent months, however, the United States Court of Appeals for the Seventh and First Circuits have adopted Drake. See, Zepik v. Tidewater Midwest, Inc., 856 F.2d 936 (7th Cir. 1988); Benitez-Allende v. Alcan Aluminio Do Brasil, 857 F.2d 26 (1st Cir. 1988). Further adding to the growing number of inconsistent and conflicting decisions, the Eastern and Western Federal Districts of Pennsylvania within the Third Circuit have since split on the issue subsequent to Drake. See, DesLauriers v. Honda Motor Co., No. 88-407, 1988 U.S.Dist. LEXIS

6754 (W.D.Pa.June 24, 1988) [following Drake] and Mason v. Bernzomatic Corp., No. 87-7380, 1988 U.S.Dist.LEXIS 7248 (E.D.Pa. July 6, 1988) [rejecting Drake in favor of plain language of Act]. See also, Kukukla v. Holiday Cycle Sales, Inc., 608 F.Supp. 266 (E.D. Mich. 1988) [following Drake].[8/]

In summary, just as existing law prior to enactment of the CPSA was found to be "hodgepodge" and consistently inadequate to afford protection to the United States consumer (The Consumer Product Safety Act, Text, Analysis, Legislative History (BNA) pp. 19-34

8/ At footnote 4 of the Kukukla decision reference is made to an unpublished decision of the United States Court of Appeals for the Sixth Circuit in Copley v. Heil-Quacker Corp., 818 F.2d 866, decided May 20, 1987, in which the Sixth Circuit concurred with Drake. (See, Sixth Circuit Rule 24 limiting publication of this decision.)

(1973)), so too is the existing state of the law within the federal courts as to whether injured parties such as petitioners are entitled to a private, federal right of action under the CPSA for violation of the CPSC's reporting rules. See, Monetary Remedies Under Sec. 23 of Consumer Product Safety Act (15 U.S.C.S. Sec. 2072) 87 A.L.R. Fed. 587. This important question of federal law and consumer protection should now be settled by this Court.

II

APPLICATION OF UNIFORM FEDERAL LAW TO A PRIVATE RIGHT OF ACTION UNDER THE CPSA IS NECESSARY TO FULFILL THE PURPOSE OF THE ACT.

An equally important and interrelated question requiring the attention of this Court is what law controls the private right of action under the CPSA? Assuming that a private right of action for

violation of the CPSC's reporting rules exists consistent with the plain language of the CPSA, does state or federal law govern the gravamen of the private right of action provided by 2072(a): the "by reason of" element of causation?

Congress failed to provide for a choice of law provision in the Act. The District Court, presuming state law controlled, dismissed petitioners' federal CPSA claims based upon New York law governing petitioners' pendent claims.[9/] The Court of Appeals affirmed on this basis.[10/] As shown below, however,

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9/ June 25, 1987 Memorandum Decision and Order (reprinted in Appendix A) at 10 - 18, relying on Boltax v. Joy Day Camp, 113 A.D. 2d 859, 493 N.Y. S 2d 590 (2d Dept. 1985) aff'd. 67 N.Y.2d 617 (1986) and Smith v. Stark, 111 A.D.2d 913, 490 N.Y.S.2d 811 (2d Dept. 1985), aff'd, 67 N.Y.2d 693 (1986).

10/ 848 F.2d at 42-43 (Appendix C) relying on Caraballo v. United States, 830 F.2d 19, 22-23 (2d Cir. 1987).

application of state law to this uniquely federal right of action contradicts the Act's purpose and prior analagous decisions of this Court.

Section 2051(b) of the Act sets forth the purposes of the CPSA. It provides:

(b) The purposes of this chapter are--

> (1) to protect the public against unreasonable risks of injury associated with consumer products;
>
> (2) to assist consumers in evaluating the comparative safety of consumer products;
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

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10/ continued

Caraballo involved a Federal Tort Claims Act suit for injuries sustained when an individual dived into a body of water in a federally operated recreational area. The Second Circuit applied the same state law decisions embraced by the District Court below in reversing a 1.2 million dollar verdict in favor of the plaintiff. Compare, Caraballo with Corbin v. Coleco Industries, Inc., 740 F.2d 411 (7th Cir. 1984).

> (4) to promote research and investigation into the causes and prevention of product-related deaths, illness, and injuries.

Subparagraph (c) of the private right of action section further provides:

> (c) The remedies provided for in this section **shall be in addition to and not in lieu of** any other remedies provided by common law or under Federal or State law. (15 U.S.C. sec. 2072(c)) (emphasis supplied).

The federal policy of the Act is abundantly clear. Section 2072 of the CPSA was enacted to provide individuals injured by reason of a violation of a Commission rule or order a federal right of action, independent of any state law cause of action which they may have. Wahba v. H&N Prescription Center, Inc., 539 F.Supp. 352, 356 (E.D.N.Y. 1982) ["the cause of action created by 15 U.S.C. sec. 2072 is essentially one of strict liability, notwithstanding possible state law restrictions on

theories of liability".] Promotion of the federal policy favoring consumer protection and aimed at prevention of injuries (contrary to State laws merely providing for compensation after injuries have already occurred) embodied in the Act requires the uniform application of federal law.

As recognized by this Court, in filling the "interstices of federal law", Moor v. County of Alameda, 411 U.S. 693, 701, 93 S.Ct. 1785, 1791, 36 L.Ed.2d 596 (1973), the choice between national uniformity and state conformity depends upon whether the "implementation of federal interests requires overriding the particular state rule involved." United States v. Yazell, 382 U.S. 341, 352, 86 S.Ct. 500, 507, 15 L.Ed.2d 404 (1966). Where federal objectives can be realized only through a uniform rule, the

vagaries of state law will not be allowed to frustrate nationwide goals. See, e.g. Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980).

Here, Congress' expressed intent in the CPSA is that of uniformity and the prevention of injuries in the face of a "hodgepodge" of state product liability laws. This uniformity can only be gained through invocation of federal law. See, Bank of America National Trust and Savings Association v. Parnell, 352 U.S. 29, 34, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956); Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d. 486, 491-93 (2d Cir. 1968). C.f., In Re Agent Orange Product Liability Litigation, 635 F.2d 987, 993-995 (2d

Cir 1980), cert. denied, 454 U.S. 1128, 102 S.Ct. 980, __ L.Ed.2d __ (1981) [court declining to invoke federal common law over claims by veterans injured by chemical defoliant used in Viet Nam, citing lack of identifiable federal policy.]

Clearly, a federal standard of causation, due to numerous variations among the states, was central to Congress' recognition of a need for uniform safety standards for consumer products. 15 U.S.C 2051(b)(3). Indeed, prior to enactment of the CPSA, a study of consumer product safety regulation found state and local laws to be a "hodgepodge of tragedy inspired responses to challenges which cannot be met by restricted geographical entities." H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 21 (1972).

For example, the term "proximate

cause" means many different things in varying jurisdictions. See, 65 C.J.S. Negligence sec. 103 (and cases cited therein) ["it has been recognized that the various definitions and tests of proximate cause are inadequate to afford a definite and invariable rule whereby a rule can be drawn between the causes which the law regards as sufficiently proximate and those which are too remote to be the foundation of an action"]. Congress, therefore purposely rejected the vague notion of "proximate cause" in favor of the "by reason of" element of causation under federal law, which, consistent with the preventive nature of the Act, is remedial in nature and a more broad and uniform standard. Wahba, supra. ["...the federal character of the private right of action is designed to guarantee plaintiffs the option of a

federal hearing regardless of the availability of other forms, and to make clear that a knowing violation of a consumer product rule alone gives rise to liability without resort to proof of negligence of breached warranties" (emphasis supplied)].

In Sedima v. Imrex Co., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) this Court noted in the context of the similar private right of action provided in the Racketeering Influenced and Corrupt Organization Act (RICO), that 18 U.S.C. 1964(c) is "in part intended to fill prosecutorial gaps" and therefore artificial restrictions on private suits would not be allowed because such restrictions would defeat RICO's purpose. Id. at 357, citing to Reiter v. Sonotone Corp., 442 U.S. 330, 344, 60 L.Ed.2d 931, 99 S.Ct. 2326 (1979). This same

reasoning holds true for private rights of action under the CPSA, and it is in this light that the "by reason of" standard should be judged.

Recently, in Bass v. Campagnone, 838 F.2d 10 (1st Cir.1988), the "by reason of" element of causation in RICO was defined. There, the United States Court of Appeals for the First Circuit following this Court's pronouncement in Sedima held "by reason of" to mean an injury merely "flowing from" the commission of predicate acts. 838 F.2d at 12, also citing Haroco, Inc. v. American National Bank and Trust Co. of Chicago, 747 F.2d 384, 398 (1984) aff'd, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437. See also, Terre Du Lac Association, Inc. v. Terre Du Lac, Inc., 772 F.2d. 467, 472 (8th Cir.1985) [standing under section 1964(c) exists "even though

the plaintiff only alleges that it suffered indirect injury."], cert. denied, 475 U.S. 1082, 106 S.Ct. 1460, 1461, 89 L.Ed.2d 718 (1986).

Here, the lower courts' dismissal of petitioners' claims centered on the issue of proximate cause under New York law. The element of causation in a CPSA private claim; the "by reason of" clause of section 2072(a), is not, and consistent with the federal purpose of the Act, cannot be, governed by state law. See, Payne v. A.O. Smith Corp. 578 F.Supp. 733, 737 (S.D. Ohio 1983) [parties agreeing that CPSA claims are different from balance of state law product liability claims and the court noting "...causation and other issues may differ under a Sec. 2072 claim and a common law tort/product liability claim" ... "it appears the only jury questions

under a CPSA claim are whether an injury occurred, the amount of damages, and whether the Defendant 'knowingly' violated certain safety rules. Jury issues in a typical tort suit are numerous."]; The Consumer Product Safety Act and Private Causes of Action for Personal Injury: What does a Consumer Gain? 30 Baylor L.Rev. 115, 118-22 (1978). [11/]

11/ Significantly, the industry's motions for summary judgment asked the District Court to find petitioner's conduct was, under New York law, the sole proximate cause of Donald Kelsey's injuries. The court instead found, under state law, petitioner's conduct was a superseding cause of his injuries. Memorandum Decision and Order at 17. Superseding cause is defined as "an act or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Black's Law Dictionary 1289 (5th ed. 1979). Therefore, as respects the federal CPSA claim, the District Court's holding supports the conclusion that respondents' violations of the reporting rules were a "substantial factor" in bringing about petitioners' injury, and therefore surely satisfies the federal "by reason of" causation standard of 2072(a).

As noted in Butcher v. Robertshaw Controls Co., 550 F.Supp. 692, 702 (D.Md.1981) with respect to the "by reason of" causation issue,

> while it may be difficult for plaintiffs to establish that but for the alleged misrepresentations and concealments the CPSC would have acted and that but for the CPSC's inaction the calamity would never have occurred, these elements of proof must await trial. Id.

Petitioners have been denied a trial on their federal CPSA claims. A private right of action under the CPSA is, by necessity, governed by federal law. Application of state law by the courts below to deny petitioners a hearing, without any reference to federal law, necessitates review by this Court in order that petitioners' distinctly federal cause of action, independent from state law remedies, be given the effect intended by Congress.

III

AN AGENCY RELATIONSHIP EXISTS BETWEEN THE CPSC AND MEMBERS OF THE CONSUMING PUBLIC SO AS TO PERMIT A FEDERAL ACTION BY CONSUMERS INJURED BY FRAUD AND DECEIT PERPETRATED ON THE CPSC.

In addition to petitioners' express section 2072(a) claim, petitioners also alleged below that the industry committed fraud and deceit upon the CPSC as agents of the consuming public. The District Court also did not address this aspect of petitioners' case under federal law, nor was any mention made by the Court of Appeals, presumably believing that state law controlled this claim as well.

In Butcher v. Robertshaw Controls Co., 550 F.Supp. 692, 702 (D.Md. 1981), the first reported decision to pass upon the private right of action issue here presented, the court found that an agency relationship does exist, as a creature of

statute, between the CPSC and members of the consuming public so as to permit the maintenance of an action for fraud and deceit practiced upon the CPSC, provided that the "requisite degree of causation is established". Id.

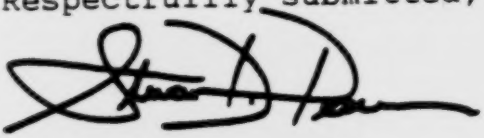
For the reasons set forth above, petitioners are entitled to a federal hearing on this claim as well. This Court should decide whether an agency relationship exists between the CPSC and members of the consuming public so as to permit petitioners' fraud and deceit claims against the industry under federal law.

CONCLUSION

Based upon the foregoing, petitioners respectfully request that their petition for writ of certiorari be granted.

DATED: November 15, 1988

Respectfullly submitted,



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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD KELSEY, DAVID KELSEY, and KATHY KELSEY,

Plaintiffs,

v.

MUSKIN, INCORPORATED, et al.,

Defendants.

MEMORANDUM DECISION AND ORDER

FACTS

On June 23, 1984, Donald Kelsey, was seriously injured when he dove into an above-ground swimming pool at the home of defendant, Donald S. Hart (incorrectly named "Sam Hart"). Plaintiffs brought this action against Donald Hart, the National Spa and Pool Institute, a trade association, fifteen named pool manufacturers and suppliers, and certain unnamed officers and directors of the

corporate defendants. Plaintiffs' causes of action are based on strict liability, negligence, and violations of the Consumer Product Safety Act, 15 U.S.C. Section 2051 et. seq.

On April 24, 1987, the following defendants moved for summary judgment:

1. Stirling Union and U.S. Fiber and Plastic Company
2. Coleco Industries
3. Doughboy Recreational
4. William Johnson, individually and d/b/a Johnson Pool Company
5. National Spa & Pool Institute
6. Esther Williams/Johnny Weissmuller Pools
7. Muskin, Incorporated, U.S. Leisure and certain officers and directors, individually
8. Muskin Corporation, Amcord and American Cement.

Defendants argue that summary

judgment is appropriate because Donald Kelsey's conduct was, as a matter of law, the sole proximate cause of his injuries. Defendant Doughboy Recreational moves for summary judgment on the additional ground that subject matter jurisdiction is lacking. Defendants Muskin Corporation, Amcord and American Cement move to strike the affidavit of plaintiffs' expert. At oral argument on April 24, 1987, the court denied the motion to strike and reserved decision on the remaining motions.

DISCUSSION

1. Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). After adequate time for discovery, Rule 56(c) mandates summary judgment "against a party who

fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex v. Catrett, 106 S.Ct.2548, 2553 (1986). In ruling on a motion for summary judgment, the court's responsibility is not to resolve disputed issues of fact, but determine whether factual issues exist, resolving ambiguities and drawing reasonable inferences against the moving party. Knight v. U.S. Fire Insurance, 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, 107 S.Ct. 1570 (1987).

2. Subject Matter Jurisdiction

Plaintiffs base jurisdiction on the federal question statute, 28 U.S.C. Section 1331, and ancillary and pendent jurisdiction. In their federal cause of action, plaintiffs allege violations of the disclosure requirements of the

Consumer Product Safety Act ("CPSA"), 15 U.S.C. Section 2064(b) (1982), and accompanying regulations issued by the Consumer Product Safety Commission ("CPSC"), 16 C.F.R. Sections 1115.12(c), 1115.12(e) (1987). Defendant Doughboy Recreational ("Doughboy") argues that no private right of action exists for such violations and plaintiffs' federal claims must be dismissed. Furthermore, Doughboy argues, once the federal claims are dismissed, the pendent state claims should also be dismissed.

In support of its argument, Doughboy cites two lines of authority. One line of cases, including a case from this district, Young v. Robertshaw Controls, 560 F.Supp. 288 (N.D.N.Y. 1983) (Miner J.), upholds a private right of action for violations of the CPSC's disclosure rules. Another line of cases, which Doughboy urges this court to follow,

holds that the statute does not create a private right of action for rule violations. See eg. Drake v. Honeywell,[1] 797 F.2d 603 (8th Cir. 1986).

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[1] The purpose of the Consumer Product Safety Act, 15 U.S.C. Sections 2051-2083, is to protect the public from risks of injury associated with consumer products. 15 U.S.C. Section 2051(b). The Act also established the Consumer Product Safety Commission which has power to issue rules to achieve the statute's objective. See 15 U.S.C. Sections 2053(a), 2058.

15 U.S.C. Section 2064(b) provides that a manufacturer who obtains information that its product contains a defect which could cause injury has a duty to disclose that information to the Commission. The CPSC's interpretation of the statutory reporting requirements are set forth at 16 C.F.R. Part 1115 (hereinafter "disclosure rules"). 15 U.S.C. Section 2072(a) provides that any person who is injured "by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission" may sue any person who violated the rule.

In Young, the court held that the plain language of Section 2072(a) supported a private damage remedy for violation of the Commission's disclosure rules. 560 F.Supp. at 292. In Drake, however, the court held the statute did

In support of their motions for summary judgment, defendants rely on several recent decisions of the New York Court of Appeals and the Appellate Division,[2] as well as a decision from

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1 continued

not create a right of action for rule violations. The court reasoned that Section 2072(a) created a private right of action for rule but not statutory violations. Since the CPSC disclosure rules were promulgated to implement the statutory reporting requirements, the court concluded a private right of action did not exist for violations of the CPSC's disclosure rules. 797 F.2d at 605-606.

2 In deciding pendent state claims, a district court applies state law, National Resources Trading v. Trans Freight Lines, 766 F.2d 65, 68 (2d Cir. 1985), as announced by the highest court of the state. See Second National Bank of New Haven v. U.S., 387 U.S. 456, 465, 87 S. Ct. 1776, 1782-83.

The Second Circuit has held that the decision of an intermediate state court is binding, unless there is persuasive evidence that the highest state court would reach a different conclusion. Entron v. Affiliated FM Insurance, 749 F.2d 127, 132 (2d Cir. 1984); See Second National Bank, 387 U.S. at 965, 87 S.Ct. at 1782-83.

this district. The facts of each case are set forth in some detail.

In Boltax v. Joy Day Camp, 113 A.D.2d 859, 493 N.Y.S.2d 590 (2d Dept. 1987), aff'd, 67 N.Y.2d 617, 499 N.Y.S.2d 660 (1986), plaintiff, a trespasser, was injured when he climbed through a hole in the fence surrounding defendants' pool and dove head-first from a lifeguard chair into the pool. 113 A.D.2d at 860, 493 N.Y.S.2d at 591. Plaintiff sued defendants, alleging: (1) the pool and the premises surrounding it were negligently maintained; (2) defendants failed to post adequate warnings; (3) the water level was too low; and (4) the lifeguard chair was improperly positioned. Id. The Appellate Division granted defendants' motions for summary judgment[3] and the Court of Appeals

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[3] In Boltax, plaintiff admitted the following facts during his deposition:

affirmed, holding:

"Assuming for purposes of this motion for summary judgment that defendants' alleged negligence--allowing trespassers to gain entry to the pool area and dangerously maintaining the pool by having it filled below capacity and by placing a lifeguard chair near the pool's shallow end--was a causative factor in plaintiff's injuries, the reckless conduct of plaintiff, an adult experienced in swimming and knowledgeable about the general dangers of diving, who admitted his familiarity with the various levels at each part of the pool, yet chose to dive head-first from the lifeguard chair into shallow water, was an unforeseeable superseding event that absolves defendants of liability...."

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[3] continued

1. After gaining access to the pool area, plaintiff swam around the pool for about 45 minutes.
2. The pool area was not lit but plaintiff was able to familiarize himself with the pool and its water depths.
3. Plaintiff observed that the water level was not normal, and estimated it was between one and one-half or two feet below the pool edge.
4. Plaintiff observed that he could sit at the shallow end and the water came to his waist. He also observed that the water around the lifeguard chair came to his chest or stomach.
5. Plaintiff executed three "flat-out dives" or "belly flops" from the lifeguard chair.

67 N.Y.2d at 619-620, 499 N.Y.S.2d at 661.

Defendants also rely on Smith v. Stark, 111 A.D.2d 913, 490 N.Y.S.2d 811 (2d Dept. 1985), aff'd, 67 N.Y.2d 693, 499 N.Y.S.2d 922 (1986). In that case, plaintiff was injured when he dove or was thrown into an in-ground pool.[4] Plaintiff alleged that defendant, the manufacturer and installer of the pool, was negligent in failing to: (1) place depth markers in the pool; (2) erect warning signs to indicate the deep

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[3] continued

6. When plaintiff attempted a head-first or perpendicular dive, his head struck the bottom of the pool. 113 A.D.2d at 859-860, 493 N.Y.S.2d at 591.

[4] The Court of Appeals decision indicates that plaintiff did not recall how he entered the pool. 67 N.Y.2d at 694, 499 N.Y.S.2d at 923.

and shallow ends of the pool; and (3) place a demarcation line or sign between the deep and shallow ends of the pool. 111 A.D.2d at 913, 490 N.Y.S.2d at 812. The Appellate Division granted defendants' motions for summary judgment[5], finding no triable issue with

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5 In Smith, plaintiff admitted the following facts during his deposition:

1. Plaintiff learned to swim at the age of eight. (Plaintiff was 18 at the time of injury).
2. At the age of ten, plaintiff was on a swimming team and learned to perform a "racing dive."
3. Plaintiff had experience in swimming in in-ground pools.
4. From the position of the diving board and the steps, plaintiff identified the deep and shallow ends of the pool.
5. Plaintiff observed other people standing in the shallow end of the pool, including people with whose height he was familiar.
6. When plaintiff attempted a head-first or perpendicular dive, his head struck the bottom of the pool.

113 A.D.2d at 859-860, 493 N.Y.S.2d at 591.

respect to proximate cause. The Court of Appeals affirmed, holding:

> "By virtue of plaintiff's general knowledge of pools, his observations prior to the accident, and plain common sense, plaintiff must have known that, if he dove into the pool, the area into which he dove contained shallow water.... The Appellate Division, therefore, properly concluded that the lack of depth warning devices was not the proximate cause of plaintiff's injuries...."

67 N.Y.2d at 694, 499 N.Y.S.2d at 923.

Defendants also rely on Belling v. Haugh's Pools, ____A.D.2d____, 511 N.Y.S.2d 732 (4th Dept. 1987). In that case, plaintiff was injured when he executed a vertical dive through an inner tube floating in a four-foot, above-ground swimming pool. Id. at 733. Plaintiff alleged that defendants, the manufacturer and retailer, were negligent in failing to warn of the dangers of diving into a four-foot pool. Id. The Appellate Division granted defendants'

motions for summary judgment,[6] finding plaintiff's conduct the sole proximate cause of his injuries. Id. at 733.

Defendants also cite Smith v. Hub Manufacturing, 634 F.Supp. 1505 (N.D.N.Y 1986)(Munson C.J.). In that case, the parents of a four-year old child, who drowned in an above-ground pool, sued the manufacturer of the pool and pool ladder, alleging defective design and failure to warn. The court granted defendant's motions for summary judgment on the failure to warn claim, finding the "danger of swimming pools to small

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[6] The following facts are apparent from the court's decision:

1. Plaintiff was an experienced swimmer. He was familiar with the pool as he had been swimming in it for several hours before the accident and had assisted the owner in its installation.

Belling, _____A.D.2d at _____, 511 N.Y.S.2d at 733.

children... obvious and well known. "id., and that plaintiffs had personal knowledge of the danger, having warned their child not to go near the pool without an adult. Id.

In opposition to defendants' motions, plaintiffs cite Howard v Poseiden Pools, 508 N.Y.S.2d 834 (1986). In that case, plaintiff entered an above-ground pool. After giving swimming instructions to his children, he observed his nephew dive from a platform through an inner-tube into the pool. Attempting to imitate the dive, plaintiff made a shallow racing dive into the pool and injured himself. Id. at 834-35. Plaintiff brought a products liability action against the manufacturers. The court denied defendants' motions for summary judgment, refusing to find as a matter of law, that plaintiff knew his dive could not be done so as to avoid a substantial risk of

severe injury. Id. at 836.

It is clear from the above cases that under New York law, a plaintiff's recklessness in diving into shallow water may be an unforeseeable superseding event absolving a defendant of liability. In Boltax and Smith v. Stark, however, the Court of Appeals, did not set forth its reasoning, nor guidelines to indicate under what circumstances diving into shallow water will act as a superseding cause, cutting off liability.[7] To rule

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[7] In Mesick v. New York, 118 A.D.2d 214, 504 N.Y.S.2d 279 (3d Dept. 1986), the court, citing Boltax and Smith v. Stark, as examples, analyzed the superseding cause issue as follows:

> "[I]t is established that a defendant is relieved of liability where, after his negligence, an unforeseeable superseding force intervenes which breaks the chain of causal connection and itself causes the injury. Further, a plaintiff's own conduct may be a superseding force absolving a negligent defendant from liability. However, in order to be a

on defendants's motions for summary judgment, this court must determine the scope of the rule set forth by the New York Courts.

Defendants argue these cases stand for the principle that "a plaintiff who disregards common sense dangers of diving into a shallow above-ground swimming pool, cannot as a matter of law, recover damages from an owner, seller, or manufacturer of the pool." Doughboy's Memorandum of Law at 6. It is doubtful that New York law sweeps quite so

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[7] continued

> superseding cause, a plaintiff's negligence must be more than mere contributory negligence, which would be relevant in apportioning culpable conduct. Rather, such conduct, in addition to being unforeseeable, must rise to such a level of culability as to replace the defendant's negligence as the legal cause of the accident."

118 A.D.2d at 218, 504 N.Y.S.2d at 282 (citations omitted).

broadly; nevertheless, the cases cited by defendants appear to preclude recovery in this case.

In Boltax and Smith v. Stark, the Court of Appeals analyzed the scope of defendants' liability in terms of proximate cause, rather than duty. Nevertheless, the Court of Appeals appears to be cutting off liability based on principles similar to those defining the scope of the duty in failure to warn cases.

New York case law based on a failure to warn is "rather sparse." Kerr v. Koemm, 557 F.Supp.283, 286 (S.D.N.Y. 1983); see eg. Voss v. Black & Decker, 59 N.Y.2d 102, 463 N.Y.S.2d 398 (1983); Torrogrossa v. Towmotor, 44 N.Y.2d 709, 405 N.Y.S.2d 448 (1978); Landrine v. Mego Corp., 95 A.D.2d 759, 464 N.Y.S.2d 516 (1st Dept. 1983); Lancaster Silo & Block Corp. v. Golconda,

75 A.D.2d 55, 427 N.Y.S.2d 1009 (4th Dept. 1980). Nevertheless, it appears that under New York law, the supplier of a product has no duty to warn "a consumer already aware--through common knowledge or learning--of a specific hazard." Lancaster Silo & Block, 75 A.D.2d at 65, 427 N.Y.S.2d at 1015; see also Torrogrossa, 44 N.Y.2d at 711, 405 N.Y.S.2d at 449. In addition, a supplier has no duty to warn when the danger is obvious or well-known.[8] Billiar v.

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[8] New York has adopted a different rule with respect to obvious dangers in a products liability action based on design defect. In Micallef v. Miehle, 39 N.Y.2d 376, 384 N.Y.S.2d 115 (1976), the Court of Appeals departed from the "patent-danger rule" under which a manufacturer had no duty to protect plaintiffs from obvious defects, holding that a manufacturer's duty to avoid unreasonable risks of harm extended to patent defects. Id. at 382-85, 384 N.Y.S.2d at 119-121, explained in, Kerr, 557 F.Supp. at 287 n.1.

This court's discussion of the duty owed in a failure to warn case is relevant only insofar as it sheds light

Minnesota Mining & Manufacturing, 623 F.2d 240, 243 (2d Cir. 1980); Smith v. Hub Mfg., 634 F.Supp. 1505, 1508 (N.D.N.Y. 1986). Whether the danger is open or obvious may be decided as a matter of law. Smith v. Hub, 634 F.Supp. at 1508; See Jimenez v. Dreis & Krump Mfg., 736 F.2d at 55. The obviousness of the danger will also affect a plaintiff's ability to prove proximate cause. A plaintiff with knowledge of the danger, either through observation or common sense, would be unable to establish that failure to warn was the proximate cause of injury because the warning would contain information the plaintiff already has. Kerr, 557 F.Supp. at 286 citing Torrogrossa, 44 N.Y.2d at

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8 continued
on the New York Court of Appeals' decisions in the pool cases. Because the outcome in this case turns on concepts of proximate case, the difference between the duties owed in failure to warn and design defect cases are of no concern.

711, 405 N.Y.S.2d at 449.

As already stated, the New York Court of Appeals has not set forth its reasoning in the pool cases. Nevertheless, the rule that appears to emerge, as interpreted in light of New York products liability law, is that a plaintiff who dives into a swimming pool, with actual or constructive knowledge that the depth of the water will not permit such action safely, has disregarded an obvious or known danger and, as a result, will be considered the sole proximate cause of his or her injuries.

In this case, defendants submit the statements of Laura Loughrey, Robin Rucynski and Richard Hart, who were with Donald Kelsey at the time of the accident. In addition, defendants submit photographs of the scene taken five days after the accident and authenticated by

the pool owner, Donald Hart. See, Exhibits A-C, Attached to Doughboy's Supplemental Notice of Motion. In opposition to the defendant's motion, plaintiffs submit the affidavits of Donald Kelsey and Dr. George Lawniczak.

The statements of Laura Loughrey, Robin Rucynski and Richard Hart establish the following facts, which are uncontroverted:

1. Donald Kelsey, Robin Rucynski and Laura Loughrey went to the Hart House at 2 p.m. and remained there until 4:30 p.m. No one went swimming; instead they sat outside and talked. Loughrey, p.1, lines 13-18.

2. At about 4:30 p.m., Richard Hart returned from work. At 5 p.m., they all left the house to attend a concert, returning sometime after 7 p.m. Loughrey, p.1, line 23--p.2, line 10.

3. When they arrived at the house,

Richard Hart and Donald Kelsey went swimming. Loughrey, p.2, lines 13-16.

4. The Hart house has two stories, with a deck at the rear. The deck is surrounded by a wooden railing about two and one-half feet high. The above-ground pool is 24 feet in diameter and situated at the rear of the house. A wooden pool deck, about one and one-half feet wide, surrounds the pool and a link fence, about two and one-half feet high, rises diagonally from the pool deck. The distance from the deck at the rear of the house to the pool is about five feet. The pool is about seven and one-half feet below the deck. The pool is about four feet deep.[9] Hart, p.1, lines 4-18.

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[9] Hart states that the pool is "four and one-half feet high in the middle and four feet high at the sides" and that "the water depth is approximately six inches below the sides." Hart p.1, lines 9-11.

5. During 1984, Donald Kelsey had been in the pool on about five occasions, and had been in the pool in previous years. The pool deck and the chain link fence have always been around the pool. Hart, p.2, lines 12-14.

6. Donald Kelsey was a good swimmer and diver and used to do swan dives off the bridge in Minetto into the Oswego River, a distance of about eight feet. Loughrey p.3, lines 12-15.

7. Between 1:30 p.m. and 7:30 p.m., Donald Kelsey consumed about 9 beers. He was "rowdy" but not intoxicated. Loughrey, p.3, lines 17-22.

8. Before the accident, Donald Kelsey and Richard Hart jumped into the pool from the railing surrounding the deck of the house. They jumped feet-first, bending and holding their knees. The jump was about seven or eight feet.

Loughrey p.2, lines 16-21.

9. Donald Kelsey and Richard Hart were in the pool for about fifteen minutes before the accident occurred. Hart, p.3, lines 14-15.

10. Robyn Rucynski was sitting in a lounge chair in the yard next to the pool with her back to the pool. She turned around to "see Don Kelsey in the air diving from the rail of the deck attached to the house, into the four foot pool. He was head first and it appeared that his arms were by his sides." Rucynski, p.1, lines 17-22.[10]

Plaintiffs have submitted the affidavit of Donald Kelsey, in which he states:

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[10] Loughrey did not witness the dive which injured plaintiff, Loughrey p.2, lines 23-24; it is unclear whether Hart witnessed the dive. Hart, p.2, line 20-23 and p.3, line 18-19.

1. Plaintiff had no formal training in swimming or diving. Para. 3.

2. On and prior to June 23, 1984 (the date of the accident), plaintiff saw Richard Hart dive head-first into the pool, without mishap, from the wooden deck and the railing on the perimeter of the deck. Para. 5.

3. No warning signs or depth markers were posted around the pool and no one warned plaintiff of the hazards of diving into the pool. Paras. 6, 9.

4. Plaintiff had seen many athletes and competitive swimmers perform similar dives without injury. Para. 11.

5. Plaintiff was not aware of the exact depth of the pool. Para. 12.

6. Plaintiff was unaware and had never been warned that diving could result in serious injury. Para. 12-13. Had plaintiff been warned of the hazards of diving in the manner he did, he would not

have dived. Para. 12.

Plaintiffs' expert, Dr. George Lawniczak, is a meterologist with a background in physics, mathematics and computers. He has co-authored a book on diving accidents and has been retained in over 150 cases involving aquatic accidents. His role in these lawsuits is to calculate trajectories, speeds and forces at impact, analyze pool dimensions and safety equipment, and determine the adequacy of warning signs and labels. With respect to this lawsuit, Lawniczak concludes that plaintiff was injured as a result of a head-first dive from an adjacent deck into Hart's above-ground pool. Injury occurred when the dive trajectory became deeper than intended. Affidavit para. 6. In addition, he states that the hazards of diving into three and one-half to four feet of water

are not open and obvious.

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11 In support of his conclusion that the dangers of diving are not open and obvious, Dr. Lawniczak states:

--an intended trajectory can easily become deeper than intended. Para. 8-10.
--an estimated 2,000 persons each year incur traumatic spinal cord injuries as a result of diving into shallow water. Diving is the fourth leading producer of traumatic spinal cord injuries. Para. 11.
--media coverage of swimming events in which swimmers dive into shallow water from starting blocks may lead recreational swimmers to believe they can perform similar dives safely. Para. 12
--During the 1960s and 1970s, advertisements depicted persons diving into above-ground pools. Even today, such ads are not uncommon. Para. 13.
--In the 1960s and 1970s, Doughboy, Coleco and Muskin began to attach warning labels to their pools. Para. 14.
--From 1967 to 1977, numerous articles appeared in the pool industry trade journals dealing with the hidden hazards of head-first entries into shallow water. Para. 17.
--The National Spa and Pool Institute standards, promulgated in 1980, required warnings on above-ground pools. Para. 17.
--No warnings were attached to the Hart's pool. Para. 20.

When only one conclusion may be drawn from the established facts, the question of legal cause may be decided as a matter of law. Boltax, 67 N.Y.2d at 620, 499 N.Y.S.2d at 661 (citations omitted). Although the dangers of diving into shallow water may vary depending on a host of factors including the depth of the water and position of the diving platform, the danger of executing a dive in the circumstances of this case are obvious and well-known. The affidavit of Dr. Lawniczak fails to create a genuine issue of fact in this regard. Donald Kelsey states he was unaware that diving in the manner he did could lead to serious injury; however, it is uncontroverted that he had been in the pool for some time before the accident and had been swimming at the Hart's pool on previous occasions. He was, therefore, familiar with the depth of the

pool: his statement that he did not know the "exact" depth of the pool fails to create a genuine issue of material fact. The court must conclude, therefore, that plaintiff, based on his observations prior to the accident and common sense, was aware or should have been aware, of the dangers of executing a dive from the railing of the deck. As a result, Donald Kelsey's conduct was, as a matter of law, a superseding cause absolving these defendants of liability. Since no triable issue of fact remains with respect to proximate cause, summary judgment is appropriate. Defendants' motions are granted.

Dated: June 25, 1987
Binghamton, New York

/S/ Thomas J. McAvoy

Thomas J. McAvoy
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD KELSEY,
DAVID KELSEY, and
KATHY KELSEY,

Plaintiffs, ORDER

vs. Civil Action No. 86-CV-757

MUSKIN, INCORPORATED, et. al., (Judge McAvoy)

Defendants.

Upon the motion of the plaintiffs pursuant to Rule 59(e) of the Federal Rules of Civil Procedure granting reconsideration of the Court's June 25, 1987 Decision, and upon the papers submitted in support of and in opposition to said motion, it is hereby

ORDERED, that the plaintiffs' Motion for Reconsideration is denied; and it is further

ORDERED, that the Clerk of the Court be and the same is hereby directed to enter a final judgment pursuant to Rule

58 of the Federal Rules of Civil Procedure dismissing the plaintiffs' Complaint in its entirety in favor of all defendants and as against the plaintiffs.

DATED. October 20, 1987

Binghamton, New York

Thomas J. McAvoy

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 873, 874, 875—August Term, 1987

(Argued: March 28, 1988 Decided: May 31, 1988)

Docket Nos. 87-7956, -7968, -7996

DONALD KELSEY, DAVID KELSEY, and KATHY KELSEY, individually,

Plaintiffs-Appellants-Cross-Appellees,

—v.—

MUSKIN INCORPORATED, a Corporation, MUSKIN CORPORATION, a Corporation, U.S. LEISURE, INCORPORATED, a Corporation, AMCORD INCORPORATED, a Corporation; AMERICAN CEMENT COMPANY, a Corporation; CERTAIN OFFICERS AND DIRECTORS OF MUSKIN, individually; CBS URBAN RENEWAL CORPORATION, a Corporation; IDEAL TOY CORPORATION, a Corporation; STERLING UNION CORPORATION, a Corporation; U.S. FIBER & PLASTICS COMPANY, a Corporation; CERTAIN OFFICERS AND DIRECTORS OF THE CBS URBAN RENEWAL CORPORATION, individually; NATIONAL SPA AND POOL INSTITUTE, a Corporation; WILLIAM LEROY JOHNSON d/b/a JOHNSON POOL COMPANY, individually; IMPERIAL POOLS, a Corporation; SAM HART, individually; COLECO INDUSTRIES, INC., a Corporation; DOUGH-

BOY RECREATIONAL, a Corporation; ESTHER WILLIAMS/JOHNNY WEISMULLER POOLS, a Corporation; BILNOR POOLS, a Corporation; and DOES 1-20, INCLUSIVE,

Defendants-Appellees,

DONALD HART (incorrectly sued as "SAM HART"), individually, and DOUGHBOY RECREATIONAL, a Corporation,

Defendants-Cross-Appellants.

Before:

FEINBERG, *Chief Judge*,
KEARSE and FRIEDMAN*, *Circuit Judges*.

Appeal and cross-appeals from a judgment of the United States District Court for the Northern District of New York, Thomas J. McAvoy, *Judge*, dismissing claim against manufacturer of above-ground swimming pool, and others, under Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq*., and state law, for injuries resulting from dive into pool.

Affirmed.

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* Daniel M. Friedman, Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

GOGGIN, CUTLER & HULL, Chicago, Illinois (Edwin J. Hull III, Steven D. Pearson, Chicago, Illinois, David M. Lascell, Nixon, Hargrave, Devans & Doyle, Rochester, New York, of counsel), *for Plaintiffs-Appellants-Cross-Appellees.*

CHAMBERLAIN, D'AMANDA, OPPENHEIMER & GREENFIELD, Rochester, New York (Thomas G. Collins, Rochester, New York, of counsel), *for Defendant-Appellee-Cross-Appellant Doughboy Recreational.*

DAMON & MOREY, Buffalo, New York (Anthony J. Colucci III, Buffalo, New York, of counsel), *for Defendant-Appellee National Spa and Pool Institute.*

HISCOCK & BARCLAY, Syracuse, New York (Robert A. Barrer, Syracuse, New York, of counsel), *for Defendants-Appellees Sterling Union Corp. and U.S. Fiber & Plastics Co.*

JAMES J. KAUFMAN, P.C., Newark, New York, *for Defendants-Appellees Muskin, Inc., U.S. Leisure, Inc., and Muskin Officers and Directors.*

SUGARMAN, WALLACE, MANHEIM & SCHOENWALD, Syracuse, New York (Donald L. Schoenwald, Syracuse, New York, of counsel), *for Defendant-Appellee Coleco Industries, Inc.*

LEVENE, GOULDIN & THOMPSON, Binghamton, New York (Elizabeth K. Joggerst, Binghamton, New York, of counsel), *for Defendants-Appellees Muskin Corp., Amcord, Inc., and American Cement Co.*

AMDURSKY, DUELL & LOVE, Syracuse, New York (Robert L. Duell, Syracuse, New York, of counsel), *for Defendant-Appellee William Leroy Johnson d/b/a Johnson Pool Co.*

KERNAN & KERNAN, P.C., Utica, New York (Merritt E. Vaughan, Utica, New York, of counsel), *for Defendant-Appellee-Cross-Appellant Donald Hart.*

KEARSE, *Circuit Judge*:

Plaintiffs Donald Kelsey and his parents, David Kelsey and Kathy Kelsey, appeal from a final judgment of the United States District Court for the Northern District of New York, Thomas J. McAvoy, *Judge*, dismissing their complaint under the Consumer Product Safety Act ("CPSA" or the "Act"), 15 U.S.C. § 2051 *et seq.* (1982), and state law, seeking damages for injuries suffered by Donald Kelsey ("Kelsey") upon his dive into an above-ground swimming pool. The defendants are the National Spa and Pool Institute, a trade association; 15 manufacturers and suppliers of above-ground swimming pools, together with certain unnamed officers and directors of the corporate defendants (the trade association, manufacturers, suppliers, and their officials collectively referred to as the "industry defendants"); and Donald Hart ("Hart"),

owner of the pool in which Kelsey was injured. The district court granted the industry defendants' motion for summary judgment dismissing the complaint against them on the ground that Kelsey's own conduct was, as a matter of law, the superseding cause of his injuries. The court dismissed the complaint against Hart for lack of subject matter jurisdiction. On appeal, plaintiffs contend principally that the court erred in granting summary judgment rather than allowing the case to proceed to trial. Defendant Doughboy Recreational ("Doughboy") cross-appeals, urging that the CPSA does not provide a private right of action and that the court should thus have dismissed the action against it for lack of subject matter jurisdiction. Hart cross-appeals, urging that the court should have granted him judgment on the merits instead of dismissing for lack of subject matter jurisdiction. For the reasons below, we affirm the judgment of the district court.

I. BACKGROUND

A. *The Events*

The following facts do not appear to be in dispute. At about 2 p.m. on June 23, 1984, Kelsey, then 21 years old, went to the Hart home with two friends, remaining there until his friend Richard Hart ("Richard"), Donald Hart's son, returned from work. At about 5 p.m., all four went to a bluegrass concert, returning after 7 p.m., whereupon Kelsey and Richard went swimming in the Harts' above-ground pool. Kelsey was a good swimmer and diver and used to do swan dives off a bridge into the Oswego River, a distance of about eight feet.

The pool, at the rear of the Hart house, was about four feet deep and was surrounded by a wooden deck about

one-and-one-half feet wide; the pool deck was surrounded by a chain link fence about two-and-one-half feet high. The rear of the Hart house had a deck that was surrounded by a railing. The pool was laterally about five feet from the house deck; it was about eight feet below the level of the railing surrounding the house deck.

Between 1:30 and 7:30 p.m. on June 23, 1984, Kelsey had consumed at least 5 beers; his blood alcohol level was later shown to be .2%. He was described by one of his companions as being "rowdy" but not intoxicated. Before the accident, he and Richard had been in the pool for some 15 minutes, having jumped in feet-first from the railing of the house deck, a jump of some eight feet. Then Kelsey dived into the pool head-first from the railing of the house deck, his arms at his sides. He struck his head on the bottom of the pool, suffering injuries that have left him a quadriplegic.

Plaintiffs brought the present action in the district court against Hart and the industry defendants for failure to provide adequate warnings that head-first diving into the pool could result in serious injury. They contended that the industry defendants' failure to warn violated the reporting requirements of the CPSA, 15 U.S.C. § 2064(b), and reporting rules of the Consumer Product Safety Commission ("Commission" or "CPSC"), 16 C.F.R. §§ 1115.12(c) and (e) (1987). Plaintiffs also contended that all defendants were liable under state-law principles of negligence and strict liability. Subject matter jurisdiction was premised on the alleged violations of the CPSA and CPSC rules.

B. *The Dismissals*

After a period of discovery, the industry defendants moved for summary judgment dismissing the complaint

on the ground that, as a matter of law, Kelsey's own conduct was the sole proximate cause of his injuries. In addition, Doughboy sought dismissal on the ground that the CPSA does not provide a private right of action for violation of the CPSC reporting rules invoked by plaintiffs, and hence the court lacked subject matter jurisdiction over the controversy.

The district court ruled that the CPSA provides a private right of action for violation of the reporting rules, and it thus denied the motion to dismiss for lack of jurisdiction. It granted the motion to dismiss for lack of proximate cause, however, on the ground that, based on his prior experience, Kelsey either was or should have been aware of the dangers of diving head-first into the pool from the house deck, and that, under New York products liability law, "a plaintiff who dives into a swimming pool, with actual or constructive knowledge that the depth of the water will not permit such action safely, has disregarded an obvious or known danger and, as a result, will be considered the sole proximate cause of his or her injuries." Memorandum Decision and Order dated June 25, 1987, at 13.

Thereafter, Hart moved for dismissal of the claims against him on the merits on the ground that the court's ruling on proximate cause was equally applicable to him. Alternatively, he sought dismissal for lack of jurisdiction on the ground that, since there was no diversity between plaintiffs and Hart, the dismissal of the claims against the industry defendants eliminated the CPSA claim and hence left no federal question to which jurisdiction over Hart could be pendent. The court dismissed the claims against Hart for lack of subject matter jurisdiction.

II. DISCUSSION

On appeal, plaintiffs contend principally that the district court erred (1) in applying state-law principles of proximate cause to the industry defendants' failure to make disclosures required by the CPSA and the Commission rules, and (2) in making credibility determinations on motions for summary judgment. Doughboy has cross-appealed, arguing that the court should have dismissed the action for lack of subject matter jurisdiction on the ground that the CPSA does not provide a private right of action for violation of the Commission's disclosure rules invoked here. Hart has cross-appealed, seeking judgment on the merits rather than a dismissal for lack of jurisdiction.

As to the industry defendants, we conclude that we need not reach the question of whether or not the CPSA provides a private right of action for violation of the CPSC reporting rules, since we conclude that the the district court properly found that there was no genuine issue as to the fact that Kelsey's own conduct was the proximate cause of his injuries. As to Hart, we conclude that the claims against him were properly dismissed for lack of subject matter jurisdiction.

A. *The Industry Defendants*

The CPSA provides a private right of action to any person injured "by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission." 15 U.S.C. § 2072(a). Consumer product safety rules are defined in the Act as rules that set safety standards or that ban products as hazardous. *Id.* § 2052(a)(2). The complaint in the present case alleges that the industry defendants violated

Commission rules that required them to report to the CPSA that head-first dives into their pools had caused serious bodily injury, *see* 16 C.F.R. §§ 1115.12(c) and (e). Whether the CPSA grants a private right of action under the Commission's reporting rules is a difficult question.

In *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986), the Eighth Circuit noted that the basic duty to report is imposed by the statute itself. The court concluded that since Congress provided a private right of action only for violation of Commission rules rather than for violation of the Act itself, and since the rules set forth in § 1115 merely specify the terms and conditions under which reports are to be made, no private right of action should be inferred under these rules. *Accord Zepik v. Ceeco Pool & Supply, Inc.*, 118 F.R.D. 455, 459 (N.D. Ind. 1987). On the other hand, in *Young v. Robertshaw Controls Co.*, 560 F. Supp. 288 (N.D.N.Y. 1983), relied on by the district court in the present case, then-District Judge Miner ruled that though the rules set forth in § 1115 "reiterate" the statutory duty to disclose, the reference in § 2072(a) to "any other rule" authorizes a private action under § 1115. *Accord Wilson v. Robertshaw Controls Co.*, 600 F. Supp. 671, 675 (N.D. Ind. 1985); *Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692, 698-99 (D. Md. 1981). Thus, the statutory interpretation question has divided the courts that have considered it.

In addition, even if a private right of action exists under these rules, there is some question whether these plaintiffs have stated a claim under them since the pool in which the accident occurred was sold in 1969, three years prior to the enactment of the CPSA and five years prior to adoption of reporting rules.

We need not, however, decide these issues, for even if they were resolved in favor of plaintiffs, we would be required to uphold the dismissal of the complaint. An injured person may not recover under the Act unless his injury occurred "by reason of" a rule violation. 15 U.S.C. § 2072(a). Where the alleged violation is a failure to disclose, the "by reason of" requirement means that there must be a causal connection between the injury and the nondisclosure. In light of the undisputed facts, we agree with the district court's conclusion that plaintiffs cannot establish that Kelsey's injury occurred "by reason of" any failure to disclose. *See Caraballo v. United States*, 830 F.2d 19, 22-23 (2d Cir. 1987).

In *Caraballo*, the plaintiff, in a federally run recreational area, dived head first into three feet of water and suffered permanent quadriplegic paralysis. Alleging a negligent failure to post warnings of the dangers of diving, he sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* (1982), which provided that the United States would be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The district court, following a bench trial, awarded damages to the plaintiff. This Court, however, noting that, "[w]here the actual cause of the injury is undisputed, the question of whether the defendant's negligence was the proximate cause of plaintiff's injury is a question of law for the court," 830 F.2d at 22, reversed. We concluded that since the injured person was an adult experienced in swimming, was knowledgeable about the general dangers of diving, and was familiar with the level of the water into which he dived, his own error of judgment was an unforeseeable superseding cause that absolved the defendant of liability. In short, the injury was not caused by the failure to post signs.

Similarly, in the present case, it cannot be said that the industry defendants' failure to report to the CPSC information as to past serious accidents involving head-first dives into above-ground pools caused Kelsey's accident. Kelsey had just been in the pool; he plainly knew it was only four feet deep. The danger of a head-first dive into such a pool from the deck of a house some eight feet higher should have been obvious to a person of his age and diving experience. A report that it was dangerous to perform such a dive would thus have disclosed only what Kelsey already knew or should have known. We agree with the district court's conclusion that the failure to report thus cannot be viewed as a cause of Kelsey's injuries.

Accordingly, the claims against the industry defendants were properly dismissed.

B. *The Dismissal of the Claims Against Hart*

We find no merit in plaintiffs' appeal from the jurisdictional dismissal of their claims against Hart or in Hart's cross-appeal seeking a dismissal on the merits. The dismissal of the CPSA claims left pending only state-law claims against Hart. Since Hart and the plaintiffs were residents of New York, there was no diversity. Because the court no longer had before it any claims of which it had statutory jurisdiction, it was appropriate for it to decline to take pendent jurisdiction of the claims against Hart. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

CONCLUSION

The judgment of the district court dismissing the complaint is affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on 18th day of August, one thousand nine hundred and eighty-eight.

Present: HON. WILFRED FEINBERG,
Chief Judge

HON. AMALYA L. KEARSE,
Circuit Judge

HON. DANIEL F. FRIEDMAN,
Federal Circuit Judge

DONALD KELSEY, DAVID KELSEY,
and KATHY KELSEY,
individually

Plaintiff-Appellants,
Cross-Appellees,

v.

MUSKIN INCORPORATED,
a Corporation, et al.,

87-7956
87-7968
87-7996

Defendants-Appellees,

MUSKIN INCORPORATED,
a Corporation, et al.,

DONALD HART (SAM HART)
DOUGHBOY RECREATIONAL

Defendant-Appellees
Cross-Appellants.

A Petition for a rehearing having been filed herein by counsel for the Plaintiffs-Appellants, Cross-Appelles, DONALD KELSEY, DAVID KELSEY and KATHY KELSEY,

Upon Consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith
Clerk

APPENDIX E

§ 2051. Congressional findings and declaration of purpose

(a) The Congress finds that—

(1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;

(2) complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately;

(3) the public should be protected against unreasonable risks of injury associated with consumer products;

(4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;

(5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and

(6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter.

(b) The purposes of this chapter are—

(1) to protect the public against unreasonable risks of injury associated with consumer products;

(2) to assist consumers in evaluating the comparative safety of consumer products;

(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

(Pub.L. 92-573, § 2, Oct. 27, 1972, 86 Stat. 1207.)

§ 2064. Substantial product hazards

(a) For purposes of this section, the term "substantial product hazard" means—

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

Noncompliance with applicable consumer product safety rules; product defects; notice to Commission by manufacturer, distributor, or retailer

(b) Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—

(1) fails to comply with an applicable consumer product safety rule; or

(2) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section,

shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

§ 2072. Suits for damages

Persons injured; costs; amount in controversy

(a) Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found.

Remedies available

(c) The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by common law or under Federal or State law.

§ 1115.12 Information which should be reported; evaluating substantial product hazard.

(a) *General.* Subject firms should not delay reporting in order to determine to a certainty the existence of a noncompliance or a defect and the substantiality of a possible hazard. The obligation to report arises upon receipt of information from which one could reasonably conclude the existence of a noncompliance or of a defect which could create a substantial product hazard. Thus an obligation to report may arise when a subject firm receives the first information regarding a potential hazard or noncompliance. (See § 1115.14(c).) A subject firm in its report to the Commission need not admit or may specifically deny that the information it submits reasonably supports the conclusion that its consumer product is noncomplying or contains a defect which could create a substantial product hazard within the meaning of section 15(b) of the CPSA. After receiving the report, the staff will preliminarily determine whether the noncompliance or defect presents a substantial product hazard. This determination can be based on information supplied by a subject firm or from any other source. If the matter is adjudicated, the Commission will ultimately make the decision as to substantial product hazard or will seek to have a court make the decision as to imminent product hazard.

(b) *Failure to comply.* Information indicating that a consumer product fails to comply with an applicable consumer product safety standard or ban issued under the CPSA must be reported.

(c) *Death or grievous bodily injury.* Information indicating that a noncompliance or a defect in a consumer product has caused, may have caused, or contributed to the causing, or could cause or contribute to the causing of a death or grievous bodily injury (e.g., mutilation, amputation/dismemberment, disfigurement, loss of important bodily functions, debilitating internal disorders, severe burns, severe electrical shocks, and injuries likely to require

extended hospitalization) must be reported, unless the subject firm has investigated and determined that the information is not reportable.

(d) *Other information indicating a defect or noncompliance.* Even if there are no reports of a potential for or an actual death or grievous bodily injury, other information may indicate a reportable defect or noncompliance. In evaluating whether or when a subject firm should have reported, the Commission will deem a subject firm to know what a reasonable and prudent manufacturer (including an importer), distributor, or retailer would know. (See § 1115.11.)

(e) *Information which should be studied and evaluated.* The following are examples of information which a subject firm should study and evaluate in order to determine whether it is obligated to report under section 15(b) of the CPSA:

(1) Information about engineering, quality control, or production data suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(2) Information about safety-related production or design change(s) suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(3) Product liability suit(s) suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(4) Information from an independent testing laboratory suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(5) Complaint(s) from a consumer or consumer group indicating the existence of a noncompliance or of a defect which could create a substantial product hazard.

(6) Information received from the Commission or another governmental agency indicating the existence of

a noncompliance or of a defect which could create a substantial product hazard.

(7) Information received from other firms, including requests to return a product or for replacement or credit, indicating the existence of a noncompliance or of a defect which could create a substantial product hazard. This includes both requests made by distributors and retailers to the manufacturer and requests from the manufacturer that products be returned.

(f) *Evaluating substantial risk of injury.* Information which should be or has been reported under section 15(b) of the CPSA does not automatically indicate the presence of a substantial product hazard. On a case-by-case basis the Commission and the staff will determine whether a defect or noncomplaince exists and whether it results in a substantial risk of injury to the public. In deciding whether to report, subject firms may be guided by the following criteria the staff and the Commission use in determining whether a substantial product hazard exists:

(1) *Hazard created by defect.* Section 15(a)(2) of the CPSA lists factors to be considered in determining whether a defect creates a substantial risk of injury. These factors are set forth in the disjunctive. Therefore, the existence of any one of the factors could create a substantial product hazard. The Commission and the staff will consider some or all of the following factors, as appropriate, in determining the substantiality of a hazard created by a product defect:

(i) *Pattern of defect.* The Commission and the staff will consider whether the defect arises from the design, composition, contents, construction, finish, packaging, warnings, or instructions of the product or from some other cause and will consider the conditions under which the defect manifests itself.

(ii) *Number of defective products distributed in commerce.* Even one defective product can present a substantial risk of injury and provide a basis for a substantial prod-

uct hazard determination under section 15 of the CPSA if the injury which might occur is serious and/or if the injury is likely to occur. However, a few defective products with no potential for causing serious injury and little likelihood of injuring even in a minor way will not ordinarily provide a proper basis for a substantial product hazard determination.

(iii) *Severity of the risk.* A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g., children, elderly, handicapped).

(iv) *Other considerations.* The Commission and the staff will consider all other relevant factors.

(2) *Hazard presented by noncompliance.* Section 15(a)(1) of the CPSA states that a substantial product hazard exists when a failure to comply with an applicable consumer product safety rule creates a substantial risk of injury to the public. Therefore, the Commission and staff will consider whether the noncompliance is likely to result in injury when determining whether the noncompliance creates a substantial product hazard. As appropriate, the Commission and staff may consider some or all of the factors set forth in paragraph (f)(1) of this section in reaching the substantial product hazard determination.

(2)

Supreme Court, U.S.
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No. 88-826

IN THE

Supreme Court of the United States

October Term, 1988

DONALD KELSEY, *et al.*,

Petitioners,

vs.

MUSKIN, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

(1) Whether certiorari should be granted where every circuit court has found no private action for violation of the Consumer Product Safety Commission reporting rules and the court below chose not to decide the question?

(2) Whether a federal, common law definition of the causation element in a Consumer Product Safety Act case would or should change the result below?

(3) Whether several respondents that admittedly have no direct connection to the product involved should nonetheless be subjected to further proceedings?

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IN THE

Supreme Court of the United States

October Term, 1988

No. 88-826

DONALD KELSEY, *et al.*,
Petitioners,

vs.

MUSKIN, INCORPORATED, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Donald Kelsey, David Kelsey, and Kathy Kelsey [hereinafter collectively referred to as the "petitioners"] have petitioned for a writ of certiorari to review a unanimous decision of the United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Northern District of New York. The petition should be denied by this Court.

This brief demonstrates that certiorari is not warranted in this case because 1) there is no split among the various federal circuits, and in fact, every federal court of appeals considering the issue of a private right of action has held contrary to petitioners' arguments; 2) a federal common law of causation would not alter the outcome of this case; and 3) liability is lacking against some of the named respondents, but particularly National Spa and Pool Institute, as to whom there is no connection to the product involved.[1]

[1] National Spa and Pool Institute, a respondent, is a not-for-profit Illinois corporation doing business as a trade association for the swimming pool, spa, and hot tub industry. National Spa and Pool Institute has no parent, subsidiary, or affiliated corporations. *See* U.S. Sup. Ct. Rule 28.1.

Statement of the Case

There is no proof that the swimming pool industry represented that diving from the railing above an adjacent house deck was a safe way to enter any body of water. More importantly, there is nothing in this record to suggest that an individual with a blood alcohol content of 0.20 percent could even locate, much less read, a conspicuous warning from eight feet above the pool. Whether Congress intended to reward such cavalier conduct is not the issue presented by this case.

Although the petitioners admit that the existence of a private right of action was not decided below, they nonetheless urge that some perceived conflict over this issue is a proper basis for issuance of the writ. *Compare* Brief for Petitioner at 13 *with* Brief for Petitioner at 14-28. In actuality, there is no conflict among the federal circuit courts considering this issue. Thus, the petitioners' primary argument is baseless, and moreover, is irrelevant to this Court's consideration because the Second Circuit decided this case on other grounds.

This case concerns causation, not the existence of a private action under the Consumer Product Safety Act, 15 U.S.C. §2051 (1982) [hereinafter referred to as the "CPSA"]. In the district court and in the Second Circuit, there was no need to consider whether a private remedy was afforded by the CPSA because this case was easily decided on other grounds. According to the petitioners, these grounds should be ignored. Whether the CPSA even applies to a trade association should be ignored. The fact that the pool was installed several years before the CPSA was enacted should be ignored according to the petitioners. These matters were not ignored by the lower courts and the sound judgment below should not be needlessly questioned. The petition should be denied.

Summary of the Argument

There is no justification for issuance of the writ in this matter. The primary issue petitioners raise—the existence of a private right of action concerning compliance with Consumer Product Safety Commission [hereinafter referred to as the "CPSC"] interpretive rules—was not decided by the lower court. Moreover, the basis for the petitioners' request—a difference of opinion between federal courts considering the issue—is misleading. Every circuit court to consider the question has decided that a private action does not exist.

In *Kelsey v. Muskin, Inc.*, 848 F.2d 39 (2d Cir. 1988), the lower court decided that the undisputed facts were fatal to the petitioners' claims whether or not the private action issue was decided in their favor. The Second Circuit decided that the cause of this incident was Donald Kelsey, not any conduct on respondents' part. While it is true that the Second Circuit did not evaluate the element of causation in a vacuum, it cannot be said that the analysis was, in any way, improper. Although petitioners intimate error, they point to no rule, case, or other authority that would counsel a different result.

Finally, even if this Court found a private action to exist and applied some new rule of causation to revivify petitioners' theory, several respondents would still be entitled to judgment as a matter of law because they admittedly were not directly connected to the product involved. This is another reason to deny the petition.

REASONS FOR DENYING THE WRIT

POINT I

The Second Circuit never reached the private action issue, but every circuit court considering the question has concluded that a private action does not exist.

Petitioners concede that the lower court never reached a decision concerning a private right of action under the CPSA. Brief for Petitioner at 13.[2] Indeed, the Second Circuit noted that "[a] report that [diving from the house deck railing] was dangerous . . . would . . . have disclosed only what Kelsey already knew or should have known. . . . The failure to report thus cannot be viewed as a cause of Kelsey's injuries." *Kelsey v. Muskin, Inc.*, 848 F.2d 39, 42 (2d Cir. 1988). The undisputed facts—that Donald Kelsey knew or should have known of the danger—permitted a decision on a different ground. The Second Circuit never reached the private action question, and the other circuits that have considered the issue have been less generous.

In fact, every circuit court addressing the question has concluded that there is no private right of action based on the failure to report allegedly unsafe products. *See Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988); *Benitez-Allende v. Alcan Aluminio Do Brasil*, 857 F.2d 26 (1st Cir. 1988); *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986); *see also Copley v. Heil-Quaker Corp.*, No. 86-3360 (6th Cir. 1987) (LEXIS, Genfed Library, Courts file).

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[2] Sidestepping the private action issue, the Second Circuit noted, "[*w*]*e need not, however, decide these issues,* for even if they were resolved in favor of plaintiffs, we would be required to uphold dismissal of the complaint." *Kelsey v. Muskin, Inc.*, 848 F.2d 39, 42 (2d Cir. 1988) (emphasis added).

On this application, the petitioners attempt to create the illusion of a split among the circuits by pointing to some district court cases decided before any circuit court considered the issue. *See Hughes v. Segal Enterprises, Inc.*, 627 F. Supp. 1231 (W.D. Ark. 1986); *Martin v. International Dryer Corp.*, 637 F. Supp. 101 (E.D.N.C. 1986); *Wilson v. Robertshaw Controls Co.*, 600 F. Supp. 671 (N.D. Ind. 1985); *Young v. Robertshaw Controls Co.*, 560 F. Supp. 288 (N.D.N.Y. 1983); *Payne v. A.O. Smith Corp.*, 578 F. Supp. 733 (S.D. Ohio 1983); *Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692 (D. Md. 1981); *see also Swenson v. Emerson Electric Co.*, 374 N.W.2d 690 (Minn. 1985) *cert. den.*, 476 U.S. 1130 (1986); *but see Kahn v. Sears, Roebuck & Co.*, 607 F. Supp. 957 (N.D. Ga. 1985); *Morris v. Coleco Indus.*, 587 F. Supp. 8 (E.D. Va. 1984) (finding no cause of action).

The first circuit court to consider the question was the Eighth Circuit in *Drake v. Honeywell*, 797 F.2d 603 (8th Cir. 1986). The Eighth Circuit properly recognized the distinction between "interpretive" rules, those merely implementing the underlying legislation, and "substantive" rules, going beyond interpretive rules by creating additional duties that may be enforced as law.[3] Applying well-settled administrative law principles, the Eighth Circuit held that the CPSC's reporting rule was not a substantive rule, and therefore, did not give rise to a private right of action. 797 F.2d at 606-09.

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[3] In fact, the Eighth Circuit was also the first court to have, for its benefit, a law review article precisely on point. *See* Note, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 70 Minn. L. Rev. 955 (1985-1986). This article was written while *Drake* was pending on appeal to the Eighth Circuit and the reasoning contained therein—elaborating at length on the distinction between substantive and interpretive rules—was adopted by the Eighth Circuit.

The *Drake* analysis was subsequently adopted by every circuit court considering the question.[4] *Drake* was found so persuasive that one court reversed its earlier position within the same case. *Compare Zepik v. Ceeco Pool & Supply, Inc.*, 637 F. Supp. 444, 451 (N.D. Ind. 1986) *with Zepik v. Ceeco Pool and Supply, Inc.*, 118 F.R.D. 455 (N.D. Ind. 1987) *aff'd sub nom., Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988) (adopting *Drake*); *see also Benitez-Allende v. Alcan Aluminio Do Brasil*, 857 F.2d 26 (1st Cir. Sept. 20, 1988); *Deslauriers v. Honda Motor Co., Ltd.*, No. 88-407 (W.D. Pa. June 24, 1988) (LEXIS, Genfed Library, Courts file); *Kukulka v. Holiday Cycle Sales, Inc.*, 680 F. Supp. 266 (E.D. Mich. Feb. 19, 1988). Four circuits are now in unanimous agreement that there is no private right of action.

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[4] Only one post-*Drake* case, from a district court, arguably disagrees with the analysis. *Mason v. Bernzomatic Corp.*, No. 87-7380, (E.D. Pa. July 6, 1988) (LEXIS, Genfed Library, Courts file). The decision in *Mason* is equivocal, however, concluding that "the court is inclined to hold that these rules do fall in the 'any other rule' category identified by the statute. . . . However, *the court shall reserve decision on this issue for a more final stage of these proceedings*, and plaintiff meanwhile may proceed as having properly stated a claim with regard to rules and regulations of the Commission under the Act." *Id.* (emphasis added). Even this case postponed making a final decision about the viability of a cause of action, and thus, cannot be considered contrary to *Drake*.

Contrary to the petitioners' assertion, these recent cases do not reflect a "growing number of inconsistent and conflicting decisions." Brief for Petitioner at 26. There is no split among the circuits and there is a general recognition that the pre-*Drake* cases were decided wrongly. Moreover, the Second Circuit never reached the issue. For these reasons alone, the petition should be denied.[5]

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[5] Even a case from the Minnesota Court of Appeals expresses skepticism about the soundness of the one pre-*Drake* Minnesota Supreme Court case supporting petitioners' view, *Swenson v. Emerson Electric Co.*, 374 N.W.2d 690 (Minn. 1985) *cert. den.*, 476 U.S. 1130 (1986). In *Jendro v. Honeywell, Inc.*, 392 N.W.2d 688 (Minn. Ct. App. 1986), the court recognized the conflicting positions adopted in *Swenson* and *Drake*, but noted that as an intermediate appellate court, it was obliged to follow the Minnesota Supreme Court.

POINT II

Creating a federal law of causation would not alter the outcome of this case.

Citing various cases suggesting the virtue of uniformity, petitioners urge that if the Court creates a federal, common law of causation, then the CPSA claim could somehow become viable. Brief for Petitioner at 28-40. Absent from their analysis, however, is any explanation of how a federal law of causation would differ from traditional tort concepts and how such a newly contrived definition would alter the outcome of this case.

The causation problems presented by recognizing a private action were highlighted recently by the Seventh Circuit. *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988). The court observed that section 23(a) of the CPSA, 15 U.S.C. §2072(a) (1982), requires proof that an injury occurred "by reason of" a CPSC rule violation, and the "by reason of" language requires proof of causation. The *Zepik* court explained:

> [t]he CPSA does not elaborate on the meaning of 'by reason of,' but in the absence of any indication that Congress intended to depart from conventional notions of causation we think *the causal connection required here should be roughly equivalent to the causal connection required to establish common law tort liability.* . . . For our purposes, it is enough to observe that given the CPSA's structure and legislative history *no plausible federal standard could deviate so radically from established concepts of causation in tort*—including those prevailing under Indiana law—as to authorize suits under section 23 for reporting violations.

856 F.2d at 942 (emphasis added). The *Zepik* court, in other words, found the causation problems presented by petitioners' view sufficient to justify the conclusion that no private action existed. The *Kelsey* court, on the other hand, found the causation problems sufficient to justify the lower court's award of summary judgment. Absent from both cases—and more importantly, from petitioners' arguments—is how a federal standard would or could change the result or solve the problems identified by the Second and Seventh Circuits.[6]

Zepik strengthens the *Kelsey* court's conclusions by establishing that a federal law of causation would not assist the petitioners, and that the speculative nature of proving the causation element constitutes a separate basis for refusing to find a private right of action in the first place. Though petitioners would have this Court review *Kelsey*, and implicitly *Zepik*, they offer no alternative to the reasoning of either case. Petitioners simply argue that they should recover. This *ipse dixit* reasoning is no basis to grant certiorari.

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[6] Characterizing the process as speculative and attenuated, the Seventh Circuit noted that to establish "by reason of" causation, the plaintiff must show that the CPSC was deprived of information not already known, that the CPSC would have successfully countered the defect, and that the response would have been implemented in enough time and in such a manner as to prevent the injury. 856 F.2d at 942-43.

POINT III

Any claim against many of the respondents must fail because these parties have no connection to the incident.

The petitioners readily admit that they initially sued various defendants merely because these defendants were in the swimming pool business. Brief for Petitioner at 9 n.3. In other words, several defendants—including National Spa and Pool Institute—have no connection with the product involved in this accident. *Zepik v. Ceeco Pool and Supply, Inc.*, 637 F. Supp. 444, 451 (N.D. Ind. 1986) (CPSA creates no duty to report defects in other manufacturers' products).[7]

Application of the CPSA is expressly defined. The portions relied upon by the petitioners apply only to the "manufacturer ... distributor and retailer" of a consumer product. 15 U.S.C. §2064(b) (1982). These terms are defined by the CPSA and by the CPSC interpretive rules relied upon by the petitioners. *See* 15 U.S.C. §2052 (a)(4), (5) & (6) (1982); 16 C.F.R. §1115.3—1115.14 (1988).

The respondent, National Spa and Pool Institute [hereinafter referred to as "NSPI"], is the national trade association for the swimming pool, spa, and hot tub industry. The petitioners have not alleged that NSPI manufactured, distributed or sold the pool, but rather, have claimed the NSPI was an "alter ego" of the industry. Brief for Petitioner at 7-9 & n.3. None of

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[7] In fact, a reading of section 2064(b) and the definitions contained in the CPSA supports the conclusion that Congress intended to impose a duty to report only on the manufacturer, distributor, or retailer of the particular product involved, not every member of an entire industry. *Compare* 15 U.S.C. §2052(a)(4), (5) & (6) *with* 15 U.S.C. §2064(b) (1982).

these claims brings NSPI under the application of the CPSA. *Morris v. Coleco Indus.*, 587 F. Supp. 8, 10 (E.D. Va. 1984) (CPSA does not apply to NSPI because NSPI does not manufacture, distribute or sell consumer goods); *see Howard v. Poseidon Pools, Inc.*, 134 A.D.2d 926, 522 N.Y.S.2d 388 (N.Y. App. Div. 1987) *aff'd on other grounds*, _____ N.Y.2d _____, No. 224 (N.Y. Oct. 13, 1988) (NSPI owes no duty to personal injury plaintiff).

Thus, if this Court relies on the plain language of the CPSA—a suggestion, ironically, urged by the petitioners—the petition must be denied because, admittedly, several defendants have no connection to the product involved. Even if this Court granted certiorari and reversed the Second Circuit, the petitioners' claims would be fatally flawed. This is an additional reason for denying the writ.

Conclusion

For all of the foregoing reasons, the petition for a writ of certiorari must be denied by this Court.

Dated: Buffalo, New York
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(3)

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vs.

MUSKIN INCORPORATED, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DOUGHBOY RECREATIONAL (JOINED IN BY CERTAIN OTHER RESPONDENTS)

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COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case omits many facts crucial to deciding whether this case is an appropriate one for review by this Court.[1] These additional facts follow.

A. *Facts relevant to the CPSA issues*

It is undisputed that the swimming pool involved in this case was sold to the Harts in 1969. J.A. 3, 92.[2]

The CPSA was enacted, and the CPSC came into existence, in 1972 — more than three years after the subject pool was sold. 15 U.S.C.A. § 2051 (eff. date 10/27/72).

Moreover, it was not until 1978 — some *nine* years after this pool was sold — that the CPSC promulgated its regulations interpreting the hazard reporting duty imposed directly by the statute. 43 Fed. Reg. 34998 (Aug. 7, 1978).

Because this pool was sold in 1969, the Second Circuit cautioned that, even if a private right of action exists for an alleged violation of the reporting rules, it is doubtful that these plaintiffs could state such a claim. 848 F.2d at 42.

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[1] Petitioners will be referred to hereinafter as plaintiffs or by their names; respondents, as defendants. This brief in oppostion is being filed on behalf of the respondent Doughboy Recreational. Pursuant Rule 28.1 of this Court's Rules, Doughboy is an unincorporated division of Hoffinger Industries, Inc., a Delaware corporation. Several other respondents are joining in this brief to avoid repetition. Counsel for those respondents are listed at the end of this brief and will be filing separate appearances and statements under Rule 28.1

[2] Citations "J.A." and "Supp. J.A." refer to the joint appendix and supplemental joint appendix filed in the Second Circuit. A copy of each is being filed with the Clerk of this Court for convenient reference, if needed.

Further, several defendants are mentioned in the complaint only in plaintiffs' joint or "enterprise liability" claims under *state* law. J.A. 36-44. These defendants are not alleged to have manufactured the pool involved in this case. And they are not alleged to be liable under the CPSA claims.

B. ***Facts relevant to the causation issue***

Donald Kelsey admits that he injured himself by diving head-first from the top railing of a deck, over the pool's own fence and deck, and into a four foot, above ground swimming pool. J.A. 234-236. He had been swimming in the pool with the homeowner's son, Richard, on many occasions before the day of the accident. J.A. 93-94. On that day, both were in the pool for about fifteen minutes before plaintiff's dive. *Id.*

These basic facts about the dive itself are admitted by plaintiffs. They admit as well that Donald Kelsey was 21 years old at the time of the accident and a high school graduate, who has since completed his first year of college. Supp. J.A. 528-529 (plaintiffs' answers to Muskin, Inc. interrogatories).

Prior to his dive, Donald Kelsey drank at least "four to five" beers. *Id.* at 530. His blood alchohol content was later found to be .20%. J.A. 203.

A number of other facts are established by eyewitness affidavits and the photographs of the scene — and are not disputed by plaintiffs. A witness who dated plaintiff for a couple of years said she saw him on swimming outings diving from a bridge into the Oswego River. She described plaintiff as "a good diver and a good swimmer." J.A. 84-85, 88.

As noted above, Richard Hart also had been swimming with plaintiff on many occasions. Hart said he "knew [plaintiff] knew how to swim . . . ." J.A. 94.

Plaintiff has not denied that he was a good swimmer and diver. All he said on the subject of his experience with swimming and diving is that he had no "formal training in swimming or diving." J.A. 234.

But the extreme recklessness of Donald Kelsey's conduct cannot be fully appreciated without a clear picture of the physical layout of the house-deck and pool, as shown by Hart's description and the photographs. Hart said the house-deck is about five feet from the pool and the pool's own fence and deck extend about two feet more (1 1/2 ft. deck, plus the slanted fence), placing the house-deck about seven feet away from the water horizontally. Vertically, it is seven and a half feet above the pool and the railing extends upward another two and a half feet, for total vertical drop of about ten feet. J.A. 92.

The photographs of the deck and pool confirm Hart's description. Supp. J.A. 548-550 (Doughboy Exhs. A-C; color prints of the photographs are included in the supplemental joint appendix). The homeowner attested that they "fairly and accurately show the relative positions of the deck attached to the house and the swimming pool below and to the rear of the deck" on the day of the accident. Supp. J.A. 547.

Based on these facts, the Second Circuit concluded:

> [I]t cannot be said that the industry defendants' failure to report to the CPSC . . . caused Kelsey's accident. Kelsey had just been in the pool; he plainly knew it was only four feet deep. The danger of a head-first dive into such a pool from the deck of a house some eight feet higher should have been obvious to a person of his age and diving experience. A report that it was dangerous to perform such a dive would thus have disclosed only what Kelsey already knew or should have known . . . [T]he failure to report thus cannot be viewed as a

cause of Kelsey's injuries.

848 F.2d at 43.

SUMMARY OF ARGUMENT

There is no conflict among the circuits over whether a private right of action exists for violations of the CPSC's hazard reporting rules. All four courts of appeals that have decided the issue have held, with no dissents, that no such right of action is intended. Moreover, since the pool in this case was sold in 1969 — nine years before the reporting rules were issued — such a right of action would not apply in this case, in any event.

As to the claim that this court should adopt a uniform federal standard of causation for claims under the CPSA, the petition fails to indicate what the standard should be, or how it would differ from the one used by the Second Circuit in this case. Once again, the unusual facts of this case — the pool being sold before the CPSC existed and the extremely reckless dive by Donald Kelsey — make it clear that, under any rational causation requirement, Kelsey's own conduct is the sole cause of his injury.

Since Plaintiffs present only academic questions having no effect on the parties to this case, the petition should be denied.

REASONS FOR DENYING THE WRIT

POINT I: The Federal Courts — Including All Four Courts Of Appeals That Have Decided The Issue — Are Well On Their Way To Resolving Earlier District Court Conflicts Over The Existence Of A Private Right Of Action; And, Since The Second Circuit Declined To Decide The Issue, Review By This Court Is Especially Unnecessary In This Case

The petition offers the semblance of a conflict among the circuits by labelling district court decisions with the circuit in which the district court sits. Pet. 21-24. But no true conflict exists among the courts of appeals.

Four courts of appeals have decided the issue whether a private right of action exists for failure to report a product hazard. All four have held that Congress did not intend to create a private right of action for such conduct. The first court of appeals to address the issue was the Eighth Circuit in *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986).

In *Drake* the court examined the language of the private remedy provision, the legislative history, the remedial structure of the CPSA as a whole, and a variety of policy considerations as well, in determining that Congress did not intend a private remedy for violation of the CPSA's rules interpreting § 2064(b). 797 F.2d at 606-610.

Since *Drake*, three other courts of appeals have agreed that no private right of action exists for violation of the reporting requirement. In *Benitez-Allende v. Alcan Aluminio Do Brasil*, 857 F.2d 26 (1st Cir. 1988), the court briefly summarized the reasoning in *Drake* and concluded: "We see no need to repeat here the entire Eighth Circuit analysis. We agree with its result for the reasons it has set forth." 857 F.2d at 35.

Similarly, the court in *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988), expressly agreed "with the result in *Drake* and with much of its reasoning." *Id.* at 941. *Zepik* also held that Congress could not have intended a private right of action because the causal link between a defendant's failure to report and a plaintiff's injury would be "too attenuated and speculative to satisfy generally applicable standards of causation in fact or proximate cause." *Id.* at 942. *See also Copley v. Heil-Quaker Corp.*, 818 F.2d 866 (6th Cir. 1987) (text in Westlaw, CTA Database; holding issue of private right of action "controlled by the reasoning stated in *Drake*").

Each of these court of appeals cases has been decided unanimously.

As the petition concedes, the district courts facing the issue since *Drake* have, with (perhaps) one exception, agreed that no private right of action exists. *Deslauriers v. Honda Motor Co.*, No. 88-407 (W.D. Pa. June 24, 1988) (available on LEXIS, Genfed Library); *Kukulka v. Holiday Cycle Sales, Inc.*, 680 F. Supp. 266 (E.D. Mich. 1988); *Zepik v. Ceeco Pool & Supply, Inc.*, 118 F.R.D. 455 (N.D. Ind. 1987), *aff'd sub nom., Zepik v. Tidewater Midwest, Inc., supra.*

Indeed, the district court in *Zepik* had earlier upheld the CPSA claim in that case, relying on pre-*Drake* district court cases. *Zepik v. Ceeco Pool & Supply, Inc.*, 637 F. Supp. 444, 451 (N.D. Ind. 1986). When the issue was raised again, however, the district court in *Zepik* found "the *Drake* opinion to be better reasoned and more persuasive than" district court decisions pre-dating *Drake. Zepik v. Ceeco Pool & Supply, Inc., supra,* 118 F.R.D. at 458-459.

The lone exception since *Drake* is a tentative ruling in *Mason v. Bernzomatic Corp.*, No. 87-7380 (E.D. Pa. July 6, 1988) (avail-

able on Westlaw, DCT Database). The court there said only that it was "inclined" to hold a private right of action exists for violation of the reporting requirements. But the court then expressly reserved decision on the issue until a later stage in the action.

This tentative ruling in *Mason* hardly betokens a "growing number of inconsistent and conflicting decisions" in the years since *Drake,* as claimed by plaintiffs. Pet. 26.

To the contrary, the decisions since *Drake* show that the lower federal courts are resolving the early district court conflicts and achieving precisely the uniformity plaintiffs claim to be seeking. There is no need for this court to expend its scarce time and resources on this issue.

This is particularly so in this case, where the Second Circuit declined to decide the question as unecessary. The court pointed out that peculiar factual problems muddy the issue here. The pool in this case was sold in 1969. Congress did not enact the CPSA until 1972. And the rule supposedly violated by the defendants was not issued by the CPSC until 1978 — some nine years after the pool was sold.

Furthermore, several of the defendants are not even alleged to have manufactured this pool. As the Second Circuit noted, even if a private right of action existed, it would not help the plaintiffs in this case. How could the defendants have violated a reporting rule as to a pool which was sold nine years before the rule was issued — and a pool they did not make, at that?

In short, even if this Court at some point may resolve the private right of action issue, this is not the case in which to do so. A decision of that issue here would have no effect on the outcome between these parties. What plaintiffs seek, in effect, is an advisory opinion on whether *Drake* and the cases that follow it are correctly decided.

Accordingly, the petition should be denied.

POINT II: Donald Kelsey's Extreme Recklessness Was The Sole Legal Cause Of His Injuries Under Any Rational Standard Of Causation; Thus, Construction Of The "By Reason Of" Requirement In § 2072 Would Not Affect The Result On The Unusual Facts In This Case

The petition argues at length that this Court should articulate a uniform federal law of causation for suits under the CPSA. But nowhere does the petition articulate what the uniform federal standard should be. Nor is there any hint of how any such rule would differ from the familiar common law proximate cause standard.

Plaintiffs appear to recognize that the "by reason of" language in § 2072(a) requires some level of causation. The thrust of their argument is that, whatever the causation element of their CPSA claim may be, it must be different from the common law concept of proximate cause, apparently because they believe that would allow them to recover in this case.

But plaintiffs have offered no persuasive reason why the causation element of a CPSA claim should be any different from the traditional proximate cause element. Interestingly, they cite this Court's treatment of the "by reason of" element of a RICO claim in *Sedima v. Imrex Co.*, 473 U.S. 479 (1985), as supporting a lesser standard of causation. The focus of the *Sedima* decision, of course, was on the kinds or categories of injury for which damages may be recovered under RICO.

When the Court did mention causation, it simply held that "the compensable injury necessarily is the harm *caused* by predicate acts sufficiently related to constitute a pattern . . . ." 473 U.S. at 497 (emphasis added); *see also id.* at n. 15 (criticizing view that "harm *proximately caused* by the forbidden conduct is not compensable"; emphasis added).

In the companion case to *Sedima*, the Seventh Circuit did focus on the application of the "by reason of" language in RICO. In *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), the court of appeals held that a defendant in a civil RICO action may be found liable for treble damages only to those injured " 'by reason of' a violation of [RICO]." 747 F.2d at 398.

The court in *Haroco* specifically held that "[T]his 'by reason of' language . . . simply imposes a *proximate cause* requirement on plaintiffs." *Id.* (emphasis added).

The Second Circuit has reached the same result under RICO. In *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988), the court began its analysis of the "by reason of" language with a reminder of the purposes for the proximate cause requirement in tort law:

> As a leading treatise explains, ". . . the consequences of an act go forward to eternity," and extending liability as far as factual causation therefore "would result in infinite liability for all wrongful acts . . . . *Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.*"

849 F.2d at 63 (quoting Prosser & Keeton on Torts 264 (5th ed. 1984); emphasis added). The court in *Sperber* went on to hold

that, under RICO, "[i]t is clear that [compensable] injuries must be proximately caused." 849 F.2d at 64.[3]

Returning to the CPSA, the Second Circuit in this case appears to have read § 2072's "by reason of" language as it did in the RICO statute in *Sperber*: as imposing a proximate cause requirement. In other words, a plaintiff under the CPSA would be required to show that the alleged violation of a CPSC rule was a proximate cause of the plaintiff's injury. *Accord Zepik v. Tidewater Midwest, supra,* 856 F.2d at 942 ("the causal connection required [under the CPSA] should be roughly equivalent to the causal connection required to establish common law tort liability").

In any event, no matter what standard of causation is read into the "by reason of" language, the result under the unusual facts of this case would not change. The causation issue poses two different sets of problems in this case.

First, there are the inherent difficulties in showing that a failure to report the supposed hazard to the CPSC had any causal relationship to Donald Kelsey's conduct at all. The magnitude of

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[3] Since the petition attacks the Second Circuit for applying the New York rule on proximate cause in these swimming pool diving cases, it is worth noting that the New York courts have explained the purposes of proximate cause in the same terms as the quotation from *Sperber, supra.* For example, in *Mack v. Altman's Stage Lighting Co.*, 98 A.D.2d 468 (2d Dept. 1984) (Titone. J.), the court wrote:

> The concept of [proximate] cause operates as a matter of public policy to place reasonable limits on liability . . . . As Justice Hopkins noted . . . "an intolerable burden would be cast on human activity if every voluntary act was committed at one's peril" (. . . citing Holmes, The Common Law, pp. 93-96).

98 A.D.2d at 470 (citations omitted). *Mack* was cited with approval in *Smith v. Stark,* 67 N.Y.2d 693, 694 (1986), one of the leading cases in New York involving swimming pool diving accidents, where the court held that "the lack of depth warning devices was not the proximate cause of plaintiff's injuries . . . ."

these causation problems has been a primary factor in the decisions refusing to recognize a private right of action under the reporting rules. *See Zepik, supra,* 856 F.2d at 942-943; *Drake, supra,* 797 F.2d at 610.

To show causation in this case, for example, plaintiffs would need to prove that if the defendants had reported to the CPSC, the CPSC would have decided to hold a hearing. Then they would have to show that the CPSC would have found that the common above ground swimming pool constitutes "a substantial product hazard." 15 U.S.C. § 2064(c) and (d).

Next, plaintiffs would have to invite the court or jury to speculate as to what remedy, if any, the CPSC might have ordered. And, in the end, plaintiffs would have to prove that, assuming all of the above, whatever the CPSC decided to do would have been accomplished *before* the date of this accident and that it would have been *effective* to prevent Donald Kelsey from doing what he did.

As the Eighth Circuit pointed out, these difficulties involve more than just proof problems for plaintiffs. They implicate the very integrity of the judicial factfinding process. To make all these findings would inherently involve pure speculation at every step. As the court in *Drake* concluded, "We doubt that Congress intended to set such a tortuous process in motion." 797 F.2d at 610; *see also id.* n. 12.

Because of these difficulties the court in *Zepik, supra,* declined to decide whether a federal causation rule is needed. The court merely held that "[f]or our purposes, it is enough to observe that . . . no plausible federal standard could deviate so radically from established concepts of causation in tort . . . as to authorize suits . . . for reporting violations." 856 F.2d at 942.

The second set of problems arising from the causation issue relate to the peculiar facts of this case. Among the links in the causation chain noted above is the need to show what remedy, if any, the CPSC would have ordered in response to a report from the defendants. This element is particularly difficult in this case, because the swimming pool here was sold in 1969 — three years before the CPSC came into existence.

Plaintiffs would be faced with proving that the CPSC would have ordered some type of remedy with retroactive effect. For just this reason the court in *Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm.*, 569 F.2d 831, 840-841 (5th Cir. 1978), found that CPSC rules requiring warning signs for pool slides that would have applied only prospectively would not be effective.

The problems are exacerbated in this case by Donald Kelsey's almost unbelievably reckless conduct in diving from the deck railing into the pool. Given that conduct by an experienced swimmer and diver, the final link in the causation chain — that whatever remedy the CPSC might decide to order would be effective to prevent this plaintiff's injury — could never be shown.

As the court in the *Aqua Slide* case put it, such conduct "bespeaks the kind of foolhardiness for which [warning signs] would provide no cure." 569 F.2d at 841 (finding insufficient evidence to show that warning signs would be heeded by users).

That, of course, is exactly the basis for the holding by the Second Circuit in this case that neither the alleged failure to warn under the various state law theories, nor the alleged failure to report to the CPSC, were a proximate cause of Donald Kelsey's injury.

In light of the extreme recklessness involved here, adoption of a "federal" standard of causation could not affect the result in this case. Accordingly, the petition should be denied.

CONCLUSION

Even if a private right of action existed and even if a uniform federal standard of causation were adopted, Donald Kelsey's own reckless behavior was, and would remain, the sole cause of his injuries. Consequently, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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